

**Glenn's Trucking Co., Inc. and United Mine Workers of America.** Case 9-CA-35666

October 25, 2000

**DECISION AND ORDER**

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On May 26, 1999, Administrative Law Judge David L. Evans issued the attached decision. The Respondent filed exceptions and a supporting brief and a "reply" (sic) brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions and to adopt the recommended Order as modified.<sup>2</sup>

We affirm the judge's finding that the General Counsel met her initial evidentiary burden under *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), with respect to the Respondent's refusal to hire, or delay in hiring, the named discriminatees. We do so on the following grounds.

As set forth in detail in the judge's decision, the Union presented the Respondent with a copy of its "Preferential Hiring List" (list) containing the names of 25 employees identified to the Respondent as sympathetic to the Union. All 25 individuals named on the list applied to the Respondent for jobs at the Starfire Mine. The Respondent hired 141 drivers between July 1997 and May 1998, only 7 of whom were on the list. The Respondent hired one of the individuals named on the list in July 1997, before the Union provided the list to the Respondent; and it belatedly hired six additional list employees. Eliminating 25 available jobs filled by drivers formerly employed by the Respondent at its Leatherwood site, there remained 116 job vacancies that could have been filled by the discriminatees.

We agree with the judge that "[t]he possibilities of the Respondent's lawfully filling [the remaining] vacancies without hiring one employee on the Union's 'Preferential Hiring List' are, at minimum, statistically remote," and his further finding that "[t]he extreme [Union versus nonunion hiring] ratios clearly demonstrate animus against the employees whose names had appeared on the

Union's 'Preferential Hiring List.'" The judge implicitly found a "blatant disparity" in the Respondent's treatment of applicants. In these circumstances, the statistical evidence can be used as an element of animus. In addition, we are satisfied that the General Counsel has established the falsity of the Respondent's contention that the discriminatees were unqualified or less qualified than the employees the Respondent hired and that they had been passed over during an "honest random selection process." We are further persuaded, on the basis of the record considered as a whole, that the circumstances warrant the inference that Respondent's true motive is an unlawful one. See *Wright Line*, supra, 251 NLRB at 1088 fn. 12 (citing *Shattuck Denn Mining Co. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966)). Having concluded that the Respondent's asserted business reasons were pretextual, we also find that the Respondent failed to satisfy its *Wright Line* burden of showing that it would not have hired the discriminatees or delayed in hiring them or offering them jobs, even in the absence of their union sympathy. See *FES (A Div. of Thermo Power, Inc.)*, 331 NLRB No. 20, slip op. at 4 (2000).

**ORDER**

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Glenn's Trucking Co., Inc., Hazard, Kentucky, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(b).

"(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act."

2. Substitute the attached notice for that of the administrative law judge.

**APPENDIX**

**NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government**

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize  
To form, join, or assist any union  
To bargain collectively through representatives of their own choice  
To act together for other mutual aid or protection

<sup>1</sup> The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

<sup>2</sup> Substitute the following narrow order language for that of the administrative law judge in the recommended Order.

To choose not to engage in any of these protected concerted activities.

WE WILL NOT deny employment to employee-applicants, or delay offering employment to employee-applicants, because they have become or remained members of United Mine Workers of America or because they have given assistance or support to that labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL make the following named individuals whole, with interest, for any loss of earnings and other benefits suffered as a result of the discrimination against them:

Reid Brewer	Douglas Bush Jr.
Kermit Campbell	Charles Caudill
Clyde Cockrell	Mike Combs
John M. Fugate	Roy Gayheart
Spencer Godsey	Harold Guerra
James H. Haddix	Mike Hayes
Tom Hurley	Danny Lovins
Destry Mullins	Grover Napier
Ray Napier	Jerry Noble
Raymond Robinson	Leander Ronk
James Larry Stacy	Donny Strong
Kenneth Williams	

WE WILL remove from our files any reference to the unlawful delays in hiring, or refusals to hire, the above-named individuals, and WE WILL thereafter notify each of them in writing that this has been done and that our delays in hiring them, or our refusals to hire them, will not be used against them in any way.

#### GLENN'S TRUCKING CO., INC.

*Deborah Jacobson, Esq.*, for the General Counsel.  
*George J. Miller and Richard C. Ward, Esqs.*, of Lexington, Kentucky, for the Respondent.

#### DECISION

##### STATEMENT OF THE CASE

DAVID L. EVANS, Administrative Law Judge. This case under the National Labor Relations Act (the Act) was tried before me in Hazard, Kentucky, on January 19–21, 1999. On January 26, 1998, United Mine Workers of America (the Union) filed the charge in Case 9–CA–35666 against Glenn's Trucking Co., Inc. (the Respondent). On May 5, 1998, the General Counsel issued a complaint and notice of hearing (the complaint) alleging that the Respondent has violated Section 8(a)(3) and (1) of the Act by denying employment to 23 applicants since July 26, 1997.<sup>1</sup> The Respondent denies the commission of any unfair labor practices.

<sup>1</sup> All dates are in 1997, unless otherwise indicated.

On the testimony and exhibits entered at trial,<sup>2</sup> and on my observations of the demeanor of the witnesses,<sup>3</sup> and after consideration of the briefs that have been filed, I make the following

#### FINDINGS OF FACT AND CONCLUSIONS OF LAW

##### I. JURISDICTION

As it admits, the Respondent is a corporation that is located in Hazard, Kentucky, where it is engaged in the business of transporting coal by truck. During the year preceding the issuance of the complaint, the Respondent, in the course of those business operations, derived gross revenues in excess of \$50,000 as an essential link of interstate commerce. Therefore, at all relevant times the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. As the Respondent further admits, the Union is a labor organization within the meaning of Section 2(5) of the Act.

##### II. THE ALLEGED UNFAIR LABOR PRACTICES

###### *A. Background*

The Lost Mountain Mine and the Starfire Mine are two of the many coal strip mines that are located in the Hazard area. Cypress Mountain Coal Corporation (Cypress) was a producer that operated the Lost Mountain Mine until some time in 1994; Cypress operated the Starfire Mine until late 1998.<sup>4</sup> During the period that Cypress operated the Lost Mountain Mine, it had a contract for coal hauling with Leslie Haulers, Inc. (Leslie Haulers). When Cypress operated the Starfire Mine, it first had a contract for coal hauling with John Chaney Trucking, Inc. (Chaney Trucking). In July 1997, however, Chaney Trucking went out of business, and Cypress awarded the Starfire Mine coal-hauling contract to the Respondent. The Respondent remained the contract hauler at the Starfire Mine until Cypress closed that operation in late 1998. The essence of the General Counsel's case is that, during the period that the Respondent performed under its Starfire Mine contract with Cypress, it refused to hire, or delayed the hiring of, certain former employees of Chaney Trucking and Leslie Haulers because those employees were members of, or were in sympathy with, the Union.

In 1994, the Board certified the Union as the statutory collective-bargaining representative of truckdrivers employed by Chaney Trucking at the Starfire Mine. Also in 1994, the National Labor Relations Board certified the Union as the collec-

<sup>2</sup> Certain passages of the transcript have been electronically reproduced. Some corrections to punctuation have been entered. Where I quote a witness who restarts an answer, *and that restarting is meaningless*, I sometimes eliminate redundant words; e.g., "Doe said, he mentioned that" becomes "Doe mentioned that . . . ." In my quotations of the exhibits, I sometimes simply correct *meaningless* grammatical errors rather than use "[sic]." Some extraneous usages of "you know" are omitted.

<sup>3</sup> Credibility resolutions are based on the demeanor of the witnesses and any other factors that I may mention.

<sup>4</sup> During the 1994–1998 period, Cypress had a contractual relationship with the Union as the representative of its production employees, but those employees are not involved in this case.

tive-bargaining representative of truckdrivers employed by Leslie Haulers at the Lost Mountain Mine.<sup>5</sup> Shortly after the certifications, Cypress closed the Lost Mountain Mine; as a result, Leslie Haulers laid off all its truckdrivers. Between 1994 and early 1997 the Union and Chaney Trucking engaged in collective bargaining, but no contract was reached. During the spring of 1997, Chaney Trucking notified Cypress and the Union that it was planning to go out of business in July. Thereafter, Cypress put the Starfire Mine coal-hauling contract up for bidding.

Two types of trucks are used in the coal hauling business; to wit: tandems (or "ten-wheelers") and tractor-trailers (or "eighteen wheelers"). Tandems are single-unit trucks that are more efficient than tractor-trailers in the transportation of coal in off-road situations (for example, between the excavation site and a processing facility that is located on the same property); this is because tandems can get into tighter places, they can climb steeper grades, and they can work in slippery areas where a tractor-trailer cannot. Tandems are also used for transporting coal on public highways, but they are not as efficient for that purpose as tractor-trailers which have a much greater carrying capacity. For loads that are taken onto Kentucky highways, a driver of a tractor-trailer is legally required to have a class-A commercial driver's license (class-A license); a driver of a tandem, however, is required to have only a class-B license to operate on the public highways. (Neither type of license is required to operate coal trucks off of public highways.) Chaney Trucking and Leslie Haulers used only tandems in their operations at the Starfire and Lost Mountain mines, and only a few of their drivers had class-A licenses.

Under the regulations of the Department of Labor, Mine Safety and Health Administration, employees who work in or around coal mines, including truckdrivers, must have one or more types of training. On completion of any required training, employees are issued certificates. As reflected by certificates that the Respondent introduced into evidence, miners' safety certificates (or "safety papers") include those designated "Annual Refresher" or "Newly Employed Experienced Miner" or "Newly Employed Inexperienced Miner." An Annual Refresher certificate relates to certain property; as the name implies, employees are annually given instructions about safety factors on the mining property at which they work. A Newly Employed Experienced Miner certificate relates to one employer; as the name implies, employees are to be given certain training before they may lawfully work for a new employer, even if they are experienced in the industry. At the time that the Respondent was awarded the coal-hauling contract at the Starfire Mine, several of the alleged discriminatees already possessed Annual Refresher certificates for that property because they had worked there for Chaney Trucking during the preceding year.

<sup>5</sup> Leslie Haulers was one of several subsidiaries of a concern named "Perry Transport." At the hearing, Leslie Haulers was sometimes referred to as "Perry," or it was referred to by the name of one of Perry's other subsidiaries.

Glenn Baker is the Respondent's president.<sup>6</sup> The Respondent's principal office is located in Baker's home in Hazard. When the Respondent is under contract for hauling coal from area mines, it establishes offices at those mines, as well. Baker testified that, at the time that Cypress had the Starfire Mine hauling contract up for bidding, the Respondent was the contract hauler at another mine in the area, the Leatherwood Mine. Operations at the Leatherwood Mine were then winding down, however, and the Respondent was looking for new business. Baker submitted a bid to Cypress for the Starfire Mine contract; that bid assumed that the Respondent would be using at least some tractor-trailers. On July 10, Cypress accepted the Respondent's bid, and the date for the beginning of performance was set at July 16. At that point, the Respondent owned no tractor-trailers; this was because, in performing its previous coal-hauling contracts (including the contract at the Leatherwood Mine), the Respondent had used only tandems. On the Respondent's being awarded the Starfire Mine contract, Baker immediately began purchasing some new tractor-trailers. During the first few days of its operations at the Starfire Mine, the Respondent engaged some independent contractors,<sup>7</sup> but it also began hiring employees immediately. The parties stipulated that, between July 1997 and May 1998, the Respondent hired 141 truckdrivers for the Starfire Mine operations.

The Starfire Mine was quite close to Hazard; the Leatherwood Mine was about 30 miles away. Baker testified that on receiving the contract award from Cypress he began moving tandems from the Leatherwood Mine operation to a lot in Hazard. Baker also placed newly purchased trucks on that lot. (Also on the Hazard lot was a liquor store, and some witnesses referred to the lot as the "liquor store lot.") The parties stipulated that during 1997 the Respondent purchased 7 tandems, 16 trailers, and 11 tractors. Baker further testified that the Respondent had as many as 60 trucks operating at the Starfire Mine while he was performing his contract with Cypress.

#### *B. The General Counsel's Case-in-Chief*

*Creation of the Union's "Preferential Hiring List."* Charles Dixon is an International representative of the Union. Dixon testified that on June 25 Walter Reed, an official of Cypress, informed Dixon that his company had received bids from several trucking companies that wished to succeed Chaney Trucking as the contract hauler at the Starfire Mine. Dixon told Reed that there were certain employees of Chaney Trucking whom the Union wished any successor to hire; thereafter Dixon presented Reed with a document entitled "Preferential Hiring List." The document listed 25 employees (here alphabetically):

Reid Brewer	Douglas Bush Jr.
Kermit Campbell	Charles Caudill
Clyde Cockrell	Mike Combs
Manuel Davis	Robert Durham

<sup>6</sup> When asked at trial, Baker identified himself only as the Respondent's general manager. The answer, however, admits that Baker is its president; moreover, another individual, one Jerry Gilliam, was identified at the hearing as the "general manager."

<sup>7</sup> Baker testified that the use of independent contractors was uneconomical, and he replaced them with employees as soon as possible.

John M. Fugate	Roy Gayheart
Spencer Godsey	Harold Guerra
James H. Haddix	Mike Hayes
Tom Hurley	Danny Lovins
Destry Mullins	Grover Napier
Ray Napier	Jerry Noble
Raymond Robinson	Leander Ronk
James Larry Stacy	Donny Strong
Kenneth Williams	

(The spellings of the names of Gayheart and Stacy are corrected to reflect those of their signatures, copies of which are in evidence.) At the time that Dixon submitted the Union's "Preferential Hiring List" to Reed, 14 of the above-listed employees were still employed by Chaney Trucking at the Starfire Mine, and the remainder were drivers who had been laid off by Leslie Haulers. The listed employees were not all of those who were then employed by Chaney Trucking, and they were not all of the employees who had been laid off by Leslie Haulers. Rather, the names were those drivers of Chaney Trucking and former drivers of Leslie Haulers whom the Union believed were in sympathy with it. As will be seen, Baker acknowledged at trial that he received a copy of the Union's "Preferential Hiring List" on July 17.

*Basic stipulations and contentions.* As amended at trial, the complaint alleges that, since on or about July 26,<sup>8</sup> in violation of Section 8(a)(3), the Respondent has refused to hire all of the employees on the Union's "Preferential Hiring List" except Davis and Durham; that is, of the 25 former employees of Chaney Trucking and Leslie Haulers whose names appeared on the Union's "Preferential Hiring List," 23 are named as alleged discriminatees in the complaint. The parties stipulated that the Respondent hired Davis and Durham on July 16 and August 8, respectively. The Respondent hired alleged discriminatees Ray Napier and Ronk on September 8, 1997.<sup>9</sup> It hired alleged discriminatee Godsey on December 15, 1997; and it hired alleged discriminatees Combs and Fugate on March 9, 1998.

The parties further stipulated that, in September 1998, Respondent sent letters offering employment to all of the alleged discriminatees who had not been previously hired. The parties further stipulated that, before September 1998, the Respondent had never offered employment to the following eight alleged discriminatees: Gayheart, Guerra, Haddix, Hurley, Mullins, Noble, Robinson, and Williams. Although not a matter of stipulation, the Respondent makes no contention that it offered employment to Hayes before September 1998. An issue in this case is whether, before September 1998, the Respondent offered employment to the following nine alleged discriminatees: Brewer, Bush, Campbell, Caudill, Cockrell, Lovins, Grover Napier, Stacy, and Strong.

<sup>8</sup> Under Sec. 10(b) of the Act, July 26 is the 6 months' limitation date for the charge.

<sup>9</sup> Actually, the parties stipulated that the Respondent hired Ray Napier on September 8, "1998"; this was clearly a mutual mistake, however, as the testimony demonstrated. (For example, a supervisor who was hired in 1997 testified that Napier was hired before he was.) Moreover, the Respondent has submitted an unopposed motion that I note this mistake.

*The alleged discriminatees' applications.* Several employees testified, and it is undisputed, that before Chaney Trucking went out of business, it had a bitterly hostile relationship with the Union. Dixon testified that shortly before July 10, he received a telephone call from Baker. According to Dixon:

[Baker] basically wanted to assure me that he was not an anti-Union person or did he run an anti-Union company. That he was one of the bidders for the coal haul at Starfire. He wanted to assure me that if he was to be the one to get the coal-haul that he would sit down and try to work things out with the Union.

Baker did not deny this testimony.

Dixon testified that on July 10 he heard from another union representative that Cypress had awarded the Starfire Mine contract to the Respondent. Dixon immediately contacted alleged discriminatees Grover Napier<sup>10</sup> and Michael Hayes. Napier had been a union steward when he worked for Chaney Trucking; Hayes had been a union steward when he worked for Leslie Haulers. Dixon told Napier and Hayes to tell employees to go to the Respondent's office and submit applications for employment. All of the employees whose names appeared on the Union's "Preferential Hiring List" did so.

Almost all of the application forms that the Respondent used contained no spaces for entries of dates. Because of this fact, it is impossible to tell precisely which alleged discriminatee applied on which date.<sup>11</sup> The parties stipulated, however, that all of the alleged discriminatees applied for employment on either Friday, July 11, or Monday, July 14. From many aspects of the testimony, it appears that the great bulk of the alleged discriminatees applied on July 11. Other individuals submitted applications on July 11, and other individuals submitted applications thereafter. As well as stipulating that the Respondent hired 141 truckdrivers for work at the Starfire Mine, the parties stipulated that it rejected about 100 applicants other than the alleged discriminatees.

(Not all of the applications that the Respondent received were placed into evidence. The General Counsel placed into evidence the applications of the 23 alleged discriminatees; the Respondent placed into evidence the applications of 28 former Chaney Trucking employees, or former Leslie Haulers employees, whom it did hire, including those of alleged discriminatees Combs, Fugate, Godsey, Ray Napier, and Ronk. Of the 48 non-duplicates, only 1 bears a date; that was the application of Michael D. Pennington whom the Respondent hired on May 13, 1998. Some of the applications that the Respondent took in

<sup>10</sup> Alleged discriminatees Grover and Ray Napier are brothers. A third brother mentioned in this decision is John Napier. All subsequent references in this decision to "Napier" are to Grover, unless otherwise indicated.

<sup>11</sup> The lack of dates on the applications also makes it impossible to determine just who did get hired, and when. The parties did stipulate to the numbers of employees who were hired during each month of the Respondent's operations at the Starfire Mine, but this was not as helpful as other information would have been. In future refusal-to-hire cases, the search for truth would be better facilitated by evidence that shows just who was hired, and precisely when, and for what jobs.

1998 did have dates, and those dates were sometimes read into the record, but those applications were not offered as exhibits.)

Joan Hall is Baker's secretary; she works at the Respondent's Hazard office at Baker's home. Baker is often away,<sup>12</sup> and Hall manages the Hazard office when he is. When the July 11 applicants (including, but not limited to, the alleged discriminatees) appeared at that office, Hall gave them applications to complete; then she interviewed the applicants and made notations on their applications. Each application had spaces for the usual information (except dates), and each also had a space designated for "CDL Proof." That blank was used by Hall to indicate what type of commercial driver's license (class-A or class-B) that an applicant showed her during an interview. Hall additionally asked each applicant about the type of trucks that he had driven in the past (either tandem or tractor-trailer), and Hall entered that information in the margins of the applications.

Of the 23 alleged discriminatees, only 13 possessed class-A licenses when they applied on July 11 or 14: Bush, Cockrell, Combs, Fugate, Gayheart, Godsey, Guerra, Haddix, Hayes, Hurley, Noble, Stacy, and Strong. As all 13 of these applicants had recently been employed by Chaney Trucking or Leslie Haulers, however, none had recent tractor-trailer experience. The remainder of the alleged discriminatees had only class-B licenses, and, of course, they had no tractor-trailer experience.

*Baker's conversations with the applicants.* Baker came to the Hazard office while Hall was interviewing applicants on June 11 or 14 (or both). While Hall was interviewing some applicants, Baker had discussions with others. Alleged discriminatee Bush testified:

[Baker] started talking, and there was a few of us gathered around, or something and he said that he was mainly looking for tractor/trailer drivers and the ones that was qualified, or had the license to drive the tractors, he was wanting to hire those and then as the other trucks came in, I guess tandems or whatever, that he'd hire the rest.

Alleged discriminatee Hayes testified that when he, Brewer, Gayheart, Lovins, and Campbell were in the office:

[Baker] said that he was going to hire about fifteen to begin with and he was going to hire maybe five at a time as he got the equipment and, as he got five more trucks, he'd hire five more. Fifteen is the number that I remember that he was going to begin with.

Further, according to Hayes:

[Baker] was talking about letting the ones that didn't have their class-A license[s] use his trucks to practice. He said he'd take some of them to Leatherwood, a job somewhere in Perry County that he had had before. He would take some of them to let them practice in his tractors so that they could familiarize [themselves] and get their Class-A license[s], the ones that didn't have their Class-A license[s].

<sup>12</sup> For example, Baker not only maintained a separate office at the Leatherwood Mine, he also maintained a separate residence in the area of that mine, which was about 30 miles from Hazard.

Hayes further testified that Baker also told the group of applicants:

Well, he was going to hire us but he couldn't hire us all at one time, he was going to . . . hire fifteen and as he got five more trucks he'd put five more in those trucks and he was offering the ones that didn't have their Class-A license[s] to get their Class-A license[s] because he said they were going to use quite a few tractors.

(Hayes further testified that when he filled out his application, the fact that he had been a steward for the Union at Leslie Haulers was not mentioned; his application, however, has "UMWA Committeeman" written on it. Hall admitted making the notation, but she testified that Hayes volunteered during his interview that he had been a union committeeman at Leslie Haulers. I credit Hall.)

Alleged discriminatee Caudill testified he was in the office with Godsey, Napier, and others when Baker "told us that he could hire us if we get the class-A license. Everything was going to tractors." Alleged discriminatee Lovins testified that he heard Baker say at the time that: "He had fifteen trucks coming in or something like that, and he was going to put us to work as they come in." Lovins further testified that he later returned to the Respondent's office in order to show alleged discriminatee Brewer where the office was. According to Lovins, after Brewer finished his application, Baker invited the two men into his office. There, according to Lovins, Baker: "told us he was going to put us to work when his trucks came in. He had them scattered out and he didn't have enough trucks to put everybody to work." When testifying in the Respondent's case, Baker generally denied that he told anyone that he would hire any applicant.

*The July 15 safety-training class.* As Hall acknowledged when she testified in the Respondent's case, on July 14 and 15, she telephoned applicants who had applied by then and told them to go on July 15 to a Cypress office facility (a double-wide trailer) that was located at the entrance to the Starfire Mine. There, a safety-training class would be conducted. The following six alleged discriminatees testified that they received Hall's telephone call and did attend the training: Bush, Campbell, Caudill, Cockrell, Napier, and Stacy. According to the testimony of these six alleged discriminatees, and documents placed in evidence by the Respondent, the following seven alleged discriminatees also attended the July 15 safety-training class: Combs, Fugate, Guerra, Haddix, Hurley, Noble, and Ronk.<sup>13</sup> Napier testified officials of Cypress conducted the safety classes, but also present for the Respondent were Baker and one Jerry Gilliam. Gilliam, as the Respondent admits, was the Respondent's "General Manager of Operations." According to Napier, Baker addressed the group of applicants and introduced Gilliam as the supervisor who would be "running" the Respondent's operation at the Starfire Mine. Gilliam then addressed the group; according to Napier:

<sup>13</sup> The documentation regarding who attended the July 15 safety-training class was not complete; at least 40 individuals received the training on that date.

[Gilliam] said that he hoped everyone of us would be up on the hill working and that they was going to have four, five trucks at a time fixed and was going to put us to work in groups of four or five, but they was going to have to continue using contractors until Mr. Baker got his trucks fixed.

According to Cockrell, Baker spoke to those at the July 15 safety-training class and:

[Baker] said the trucks was going to be safe on the job. He said if they wasn't safe when we got in them every morning to not leave the parking lot, leave them set until they're fixed and he was going to try to work with everybody and try to make a good job and stuff out of it.

Neither Baker nor Gilliam disputed this testimony. Gilliam, who came to be in charge of safety for the Respondent, testified that the July 15 training was for newly employed experienced miners. A certificate that was placed in evidence by the Respondent also shows that the July 15 training was for the training of "Newly Employed Experienced Miner(s)." (This was the certificate that was issued after the session to Samuel Hollifield who was hired by the Respondent and who is not an alleged discriminatee; none other of the July 15 certificates were offered into evidence.)

Union Representative Dixon testified that on July 17, and on August 20 and 29, he met with Baker in attempts to secure employment for the alleged discriminatees.<sup>14</sup>

*Meeting of July 17.* Dixon testified that on July 17 he, Napier, and Hayes went to the Respondent's Hazard office. At that time, they gave Baker a copy of the Union's "Preferential Hiring List." During the Respondent's case, Baker admitted receiving the list at the July 17 meeting, he admitted that Dixon, Hayes, and Napier told him that the list was "a list of men that they wanted me to hire," and he admitted that Dixon, Hays, and Napier told him that the list contained the names of truckdrivers who had "worked with the Union."

Dixon testified that at the July 17 meeting:

Mr. Baker informed me that he had no intentions of fighting the Union like John Chaney had. That he had intentions of hiring all these guys, giving them a job, and that he felt that he could work things out with the Union.

...

[Baker] told us that all the drivers would need to get their Class-A license[s] because if they were happening to be driving a ten-wheeler and it broke down then they would be required to drive one of the eighteen-wheelers.

[Baker] said he would help the drivers with regards to this by getting one of his best trucks, an eighteen-wheeler, and let everybody take their test[s] with it. He wanted the ones that didn't have Class-A licenses to go ahead and immediately try to get their Class-A license[s].

Dixon, Hayes, and Napier assured Baker that they would see to it that all of the employees on the Union's "Preferential Hiring List" obtained their class-A licenses, if they did not already have them.

(Again, all of the alleged discriminatees had submitted applications to the Respondent on either July 11 or 14, but neither Dixon nor Baker testified that during their July 17 meeting that those applications were mentioned. Nor did Dixon nor Baker testify that there was any mention of the fact that some of the alleged discriminatees had attended a safety-training class for newly employed experienced miners on July 15. Nor did Dixon or Baker testify that either of these factors was mentioned in their two subsequent meetings.)

Napier testified that, further at the July 17 meeting:

Well he [Baker] said, "I've got a bunch of old trucks and some ones at Leatherwood [Mine] and I'm going to be fixing them up and try to get like four or five at a time [into operation]."

[Baker said that we] would drive the old trucks until he got new trucks in but he was going to have to continue using the contractors until he got all of his trucks down there.

Then he asked how many had a Class-A license[s] and how many had Class-B licenses. At that time I didn't know.

I had this list, this handwritten list, that I had given them we was going over it. Then he [Baker] said well he was going to have to have drivers that was qualified to drive an eighteen wheeler which they would have [to secure] class-A licenses.

They was ten of us that just had class-B licenses. He offered to let us go up to Leatherwood where he had a truck and practice on Sundays. Then when we thought we was ready he would send a driver and a new truck to Somerset for the testing station with us and four or five could follow in a car. One could drive in the truck with the driver and we would all take our test at the same day.

Baker did not deny this testimony by Dixon and Napier.

*Meeting of August 20.* On August 20, Dixon, Napier and Hayes again went to the Respondent's Hazard office. Gilliam was present with Baker. According to Dixon:

Mr. Gilliam wanted to assure me, Grover, and Mike Hayes that he had every intention of working with us and cooperating with us. That he had only been on the job for like a week and he hadn't hardly got quite familiar enough with it yet, but he assured us that he was going to start ... [h]iring the guys that we had put on the list. That he was going to [be] hiring some of those drivers. [At one] point during the meeting Mr. Baker told him, "Well you need to go ahead and hire Grover [Napier] now."

(In fact, Napier was not hired by the Respondent; again, an issue in this case is whether the Respondent ever offered employment to Napier before a stipulated offer to all alleged discriminatees that was made in September 1998.) During the August 20 meeting Napier told Baker that all of the employees who were named on the Union's "Preferential Hiring List," save one, had secured their class-A licenses. Napier further

<sup>14</sup> Dixon further testified that during these meetings he attempted to get Baker to agree to a collective-bargaining agreement. That testimony was not disputed, but there is no allegation that the Respondent, in any way, violated Sec. 8(a)(5).

testified that at the August 20 meeting Baker and Gilliam further said that: "They was going to put four or five of us to work at a time as they got the trucks fixed and they would have to continue to use the contractors until they got their own trucks fixed." Baker did not deny any of this testimony by Dixon and Napier.

Although Napier told Baker that all but one of the employees on the Union's "Preferential Hiring List" had received their class-A licenses, there were at least three of the employees named there who were never to receive class-A licenses; to wit: Davis and alleged discriminatees Ray Napier and Ronk. (As previously noted, Davis had already been hired by the Respondent on July 16, and Ronk and Napier were thereafter hired on September 8.) Brewer, Campbell, Cuadill, Lovins, and Grover Napier testified that they attended a class (the tuition for which was \$250) and secured their class-A licenses after Baker told them, and the Union, that they needed to do so "immediately." Without objection, Campbell testified that Williams and Robinson were among the employees who attended the course and that Williams and Robinson were among those who passed the test given at the end of the course; presumably, therefore, Williams and Robinson received their class-A licenses. Whether alleged discriminatee Mullins ever received his class-A license is not reflected in the record, and it must be assumed that he did not.

*Meeting of August 29.* Dixon further testified that, at a telephonic request from Baker, he went to the Respondent's office at Baker's home on August 29. Napier and Hayes did not go with him. Dixon testified that he met with Baker and Gilliam, and Baker told him that the Respondent was planning to bid on a West Virginia trucking operation and that he thought that if it was successful he could put some of the employees who were on the Union's "Preferential Hiring List" to work there. Dixon told Baker that the employees did not want to go to work in West Virginia and that Baker should put them to work in Kentucky as he had promised. Dixon testified that Baker replied that:

[I]f he could get that West Virginia coal-haul he could put everybody to work over there, but it would be hard for him to do that here at Hazard. That he might have to work out some sort of arrangement with us to provide three out of five of them a job.

Dixon further testified that during the meeting Baker told him that he could put Napier to work then, and possibly he could put Hayes to work later; Baker told Dixon to tell Napier to come back to the office. Baker's denials of this testimony will be discussed below.

Napier testified that on August 29, Dixon called him and stated that he had met with Baker and that Baker had said that he would hire him (Napier) and Hayes. On the next working day, September 2, Napier went to Baker's office. Hall told Napier that Baker was not there and that Napier should come back the next day. Napier went back to the office on September 3, but Hall told him that, again, Baker was not coming in that day. On September 4, Napier called Hall and stated that he could not be there that day; Hall replied that Baker was not coming to the office that day anyway. On Friday, September 5,

Napier again called Hall; Hall told Napier that Baker had been into the office and had "pulled" his application, and that Baker would be calling Napier during the following week; Hall told Napier to "stay by the phone." Neither Baker nor Hall called Napier thereafter. Neither Baker nor Hall denied this testimony. The General Counsel contends that Napier did not receive an offer of employment from the Respondent until he received the stipulated offer of September 1998. Again, the Respondent contends that it effectively offered Napier employment before that point, but that Napier declined.

By letter to Baker dated September 3, Dixon recited various items to which Baker had purportedly agreed on August 29, including agreements that the Respondent would consider hiring all of the employees who had been named on the Union's "Preferential Hiring List" and that the Respondent would be "contractually obligated to employ three (3) out of every five (5) employees on the preferential hiring list." Dixon's letter concluded with a request that the Respondent advise him "as soon as possible as to whether or not the above-mentioned terms are agreeable in general terms." The Respondent did not reply to this letter. By letter dated September 16, Dixon repeated his requests of September 3. By letter dated September 26, Gilliam replied that he had received Dixon's letter of September 16 and that "I deeply apologize for this response and delay." Gilliam went on to describe how busy he had been in getting the Respondent's business started, and Gilliam further stated: "I plan to get with you in a couple of weeks and discuss your proposals." Gilliam's letter concludes that: "We have already started hiring employees on the preferential hiring list as of this date." Dixon made further attempts to contact Baker, but his telephone calls were not returned and his letters were not answered.

*Testimony concerning animus.* According to alleged discriminatee Godsey, on or about December 15, he went to the Starfire Mine. There, he met with General Manager Gilliam and Foreman Dean Hoskins, and Godsey asked them for a job. At the time, Godsey also told Hoskins and Gilliam that he had signed a union authorization card when he had worked for Chaney Trucking, and Godsey expressed concern that Baker would hold that against him. Hoskins and Gilliam told Godsey not to be concerned. Hoskins and Gilliam further told Godsey that, at that moment, the Respondent needed a driver to go with other drivers to pick up some trucks that Baker had recently purchased. Godsey agreed to be the additional driver. A party consisting of Baker, Hoskins, Godsey, and two drivers whom Godsey did not know set out to retrieve the new trucks. It was lunchtime, and the group stopped at a restaurant that was owned by John Chaney, the former owner of Chaney Trucking. Godsey, who was not on good terms with his former employer, refused to go into the restaurant, and he waited for the others in an automobile in the parking lot. At one point while Godsey was waiting, Hoskins came out of the restaurant and urged Godsey to come in to eat. According to Godsey:

[Hoskins] came out and we was talking about the trucks that [Baker] bought off of John [Chaney], and we got to talking, and one thing led to another, and then he told me about a list that Cypress and Chaney had give to Glenn

[Baker] of the drivers to hire and not to hire. Godsey and Hoskins talked about other things; then Hoskins returned to the restaurant. A few minutes later, further according to Godsey, Baker came out of the restaurant, also to urge him to come into the restaurant. According to Godsey, as he and Baker conversed, Baker told him that "they" (unspecified) had given him a list of "the ones to hire and not to hire . . . but then he would hire who he wanted to." The General Counsel then asked Godsey and he testified:

Q. Did Baker say anything more to you?

A. Yeah, we just, more or less, you know, but we talked there, and he said that, then, you know, that he could hire who he wanted to. He would hire who he wanted to, you know.

Q. Do you remember him mentioning anything about a majority—

MR. MILLER: Objection—objection [to the leading nature of the question].

JUDGE EVANS: All right, let's—can you—is there anything else you can recall at this time?

THE WITNESS: Yeah, well, like, he told me, you know, if he [Baker] had hired half or a majority that he would have to give us a contract, and they [Cypress] wouldn't have given him a contract. In other words Cypress wouldn't have give him a contract to haul the coal.

During the Respondent's case, both Baker and Hoskins denied these remarks that Godsey attributed to them. Godsey further testified that after the trip to secure the trucks, Hoskins and Gilliam retrieved the application that Godsey had filed in July, and Godsey was then hired by the Respondent.

*Other stipulations.* The parties stipulated that during the following months of 1997, the Respondent hired the following numbers of drivers: July, 16; August, 28; September, 9; October, 16; November, 6; and December, 14. The parties further stipulated that during the following months of 1998, the Respondent hired the following numbers of drivers: January, 11; February, 8; March, 12; April, 9; and May, 12. Of these 141 drivers who were hired by June 1, 1998, 7 had been named on the Union's "Preferential Hiring List": Davis and Durham and alleged discriminatees Ronk, Godsey, Combs, Fugate, and Ray Napier, all of whom who were hired on the dates that are noted above.

### C. The Respondent's Case

As set forth above, Hall described on direct examination how she took applications at the Respondent's Hazard office. The Respondent maintained a file of all applications of employees who were not hired, and the Respondent presented that file during Hall's testimony. After the applications of the alleged discriminatees were removed, the parties stipulated that there were about 100 applications in that file. Although all of the applications that Hall took were undated, she testified that she could tell by marks that she had made which were those that she had taken during the first few days after July 10 (again, the date that Cypress awarded the Starfire Mine hauling contract to the Respondent). When Hall was on cross-examination, she was asked to examine the Respondent's file of rejected applica-

tions to see if any of the early applicants, other than the alleged discriminatees, had been rejected. After examining the file, Hall admitted that she could find none.

The Respondent contends that it favored its former employees in its hiring processes at the Starfire Mine. According to a list identified by Hall, there were 26 former Leatherwood Mine employees of the Respondent whom it hired at the Starfire Mine from July 1997 through September 1998.<sup>15</sup> The 1997 months, and the numbers of former Leatherwood Mine employees hired in each, were: July, six; August, six; September, two; October, three; November, two; and December, none. The 1998 months, and the numbers of former Leatherwood Mine employees hired in each, were: January, four; February, one; March and April, none; May, two; and none thereafter.

The Respondent further contends that it preferred employees who were persistent in pursuing their applications. Of the former Chaney Trucking drivers who were hired, Hall testified that Ray Napier called "at least twice a week" seeking employment "and so Mr. Baker hired him." Hall testified that Durham was also "persistent."

Baker testified that he was present "a time or two" when groups of employees came to the Hazard office and applied for work. Baker was asked and he testified:

Q. What did you tell them?

A. I told them that we would be needing a bunch of drivers, it looked like. Several of them told me that they had several years [of driving experience] in this and that. I told them that we would most certainly be able to use them, I felt like.

Baker testified that, nevertheless, he never looked at any of the applications that any of the alleged discriminatees completed, because he had not ever hired by applications. Baker testified that he had historically hired by interview and road-test only; if he decided that he wanted to hire an applicant, he would put the applicant to work and later have him complete an application. Baker testified that he had previously used applications only so that Hall would have Social Security numbers and other information when it was time to prepare paychecks. Baker admitted, however, that in this instance he told Hall to take applications before any hiring decisions had been made. Baker was therefore asked on direct examination, and he testified:

Q. Why did you tell Ms. Hall to take applications from all of these people?

A. I felt like we would be hiring them.

Q. All of them?

A. I felt like all of them qualified to work, you know, that wanted to work, I'd hire them. I didn't have any intention of not hiring them.

Q. But, you didn't hire some of them.

A. They never come and ask to work.

Q. But you had an application.

<sup>15</sup> The title of the list indicates that the 26 employees were "transferred" from the Leatherwood Mine, but cross-examination of Hall showed that many were not transferred; rather, they were only re-hired after having once worked at Leatherwood.

A. We had applications, but they never did show up to work. When they showed up to work, I hired them.

Q. Did you ever tell them or tell anyone that one of the conditions of getting hired was to show up to work or show up on the job?

A. Anybody that knows me, that has ever worked for me, has showed up on the job and talked to me and been there ready to work, if they wanted to work for me.

Q. That is not my question, Mr. Baker. My question was, did you ever tell anybody, these people who put in applications or Mr. Dixon or anyone, that if they wanted to get hired, they had to show up on the job?

A. Whenever I talked to these guys over at the [Hazard office], I said, "You fellows need to keep your eyes open and be over there when these trucks comes in. When these trucks come in, I'm going to put drivers in them. You guys need to be over there on the job now, ready to go, when this truck comes in. You need to be there. You guys now, stay in touch with me. The closer you stay in touch with me, the quicker you will go to work because I am going to be awful busy trying to get these trucks ready. Come over on the job where we are at and as these trucks come in, I'll put you guys in them."

(Below, I refer to the last-quoted answer as Baker's "seven-sentence answer.") Baker testified that every applicant whom he hired came either to the liquor store lot where he stored the trucks in Hazard or came to the mine after he began operations there. Baker admitted that Hurley approached him about a job at the liquor store lot, but he further testified that Hurley appeared inebriated to him at the time, and Baker refused to talk to him.<sup>16</sup> On cross-examination, however, Baker admitted that he nevertheless would have hired Hurley later if Hurley had met the Respondent's other requirements and had approached Baker when he was not inebriated.

Baker testified that when he met with some of the alleged discriminatees at his office he noted that "95%" of them said that they had no experience in driving tractor-trailers. Baker testified that he preferred to hire experienced tractor-trailer drivers, and he offered to let the alleged discriminatees train at Leatherwood Mine, using new tractor-trailers that he was buying. When asked why he made this offer, Baker replied: "I felt like I was going to need them." Baker testified that he told the applicants who did not have class-A licenses:

I would be glad for you guys to go up there [to Leatherwood] and I'll put you in these trucks on a Sunday when they are not working, so you can learn how to drive these tractor and trailers, so that whenever they come in, 'til I can put you guys to work.

Baker testified that he would have put the alleged discriminatees with other drivers who were experienced in driving tractor-trailers during some Sunday and, if the alleged discriminatees had taken advantage of this training offer, within a week:

they would have been prepared to drive the tractor and trailers. I think that they would have been better than some that I have had to hire that have drove tractor and trailers for me down here that I have had problems with getting out to work and so on, these younger guys, that I didn't want to hire that did have experience. I'd rather have the older guys.

(Baker testified that Napier and other of the alleged discriminatees were older employees for whom he had genuine feelings.) After giving this testimony, however, Baker was asked if he would have hired alleged discriminatee Campbell after Campbell had gone to the school to get training to secure his class-A license; Baker replied that he would not because: "He didn't have any experience in driving a tractor and trailer."

Baker further testified that, after the Respondent received the initial applications, he told Hall to call all of the applicants and tell them to go to the July 15 safety-training class because: "I didn't know how many of them I was going to need or which ones I was going to hire at that time, but I wanted all of them to be there so that they would be prepared to go when we needed them. I felt like we would, definitely, going to be needing them and we would have that little part of it behind us."

Baker testified that he hired 10 drivers on July 16, the Respondent's first day of operations at the Starfire Mine (and 1 day before he received the Union's "Preferential Hiring List"). Baker testified that the circumstances of these hirings were: (1-2) Steve Baker and Charlie Baker are his two sons; (3) Manuel Davis (who, again, is named on the Union's "Preferential Hiring List," but is not an alleged discriminatee), talked to Baker "several times" about being hired; (4) Irwin Combs (not alleged discriminatee Mike Combs) was hired because his mother worked at a dry cleaners that Baker owns and, according to Baker, "she wanted me to hire her son and I hired her son." (5-7) James Noble (not alleged discriminatee Jerry Noble), Carl Gray and Virgil Williams had driven trucks for Baker in the past. (8-9) Freddie Campbell and Max Sizemore, "might have" been recommended for hire by Noble; and (10) Jeffrey Skiles, according to Baker, was "kind of a personal friend of mine." Baker further testified that on July 22 he hired (11) Hubert (Gene) Begley because he was, according to Baker, "born and raised just across the hill from where I was and I knowed him."<sup>17</sup> As noted, the Respondent produced a list of former employees of the Leatherwood Mine who were hired at the Starfire Mine, by months, from July 1997 through May 1998. Of the 11 employees who are named in this paragraph, only Steve and Charlie Baker are named on that list.

Baker testified that after the first week of operations he turned the hiring responsibilities over to one Todd Daniels.<sup>18</sup> Hall's list shows that the following Leatherwood employees (in addition to Charley and Steve Baker) were hired in July, apparently by Daniels: (12) Ronald Folmsbee, (13) Walter Craig Sizemore, (14) Mitchel Farler, and (15) Gary Wilkerson. Al-

<sup>17</sup> Baker gave the date for the hiring of Begley on cross-examination.

<sup>18</sup> Daniels' title, if any, is not disclosed in the record. Daniels left the Respondent's employ sometime during September. Daniels did not testify; the Respondent showed that it had subpoenaed Daniels for the hearing, but he did not appear.

<sup>16</sup> On rebuttal, Hurley denied that he was inebriated when he approached Baker; however, I credit Baker's testimony that Hurley appeared inebriated.

though the parties stipulated that the Respondent hired 16 truckdrivers in July, neither party offered evidence to explain who the 16th employee was, or the circumstances of, or the reason for, that hiring.

When Gilliam was hired, he began taking part in the hiring processes. One of the persons whom Daniels and Gilliam hired in September was Dean Hoskins.<sup>19</sup> Hoskins was hired as a mechanic, but after a few weeks Baker assigned Hoskins to do the hiring, along with Gilliam (and Daniels quit). Baker testified that the reason for giving responsibility for hiring to Hoskins was that Hoskins was from the area and knew "all" of the drivers in the area.

As previously noted, Baker admitted that at his July 17 meeting with Dixon, Napier, and Hayes, he was told that the Union's "Preferential Hiring List" named drivers who had "worked with the Union" and whom the Union wanted the Respondent to hire. Baker testified that after the meeting he told Hall to file the Union's "Preferential Hiring List" with the applications that she had previously taken. When asked if he ever saw the Union's "Preferential Hiring List" again, Baker replied: "I didn't pay any attention to the list." (The copy of the list that Baker received from the Union on July 17 was not offered by either party, and what ultimately happened to it is not disclosed in the record.) Baker did not deny telling Dixon at that meeting that all of the drivers on the list should get their class-A licenses "immediately."

Baker testified that at the August 20 meeting: "I had very few words to say to [Dixon] because I felt like that Jerry [Gilliam] was a better hand to talk to him than I was, and I let Jerry do most of the talking." Baker did testify that at the August 20 meeting he offered Napier a job.

Baker was asked what had occurred at his August 29 meeting with Dixon and Gilliam, and he testified:

The only thing that was said at that time as far hiring was concerned—Me and Jerry [Gilliam] and Mr. Dixon was together. Mr. Dixon told me, he says, "Fellows, let me tell you guys. If you guys will hire these two. If you guys will hire Napier and Mike [Hays], then the hell with the rest of them. I've been aggravated with these [on the Union's "Preferential Hiring List"] as long as I want to be. Hire them two and don't worry about the rest of them." Those are the very words that he said. . . .

I told Jerry at that time to hire both of them. And, furthermore, I told Mr. Dixon to tell them to come on to the job.

Baker was specifically asked if he ever told Dixon that he was going to hire all of the alleged discriminatees; Baker replied: "I've not told anybody I was going to do anything except hire people as we needed them. I didn't say I was going to do 'all' of anything."

<sup>19</sup> Baker and Hoskins testified that Hoskins was hired in August. Hoskins, however, testified twice that Ray Napier was hired before he was. Because the parties stipulated that Ray Napier was hired on September 8, Hoskins was necessarily hired in September. (Again, records of who was hired, and when, would have been helpful.)

On cross-examination, Baker reaffirmed that the alleged discriminatees would have had to come to the Hazard liquor store lot to have been hired by him; when asked if he told Hall to tell the applicants that they also needed to come to the lot (as well as going to the safety-training class and getting their class-A licenses) to be considered for employment, Baker was first evasive, then he testified that he did so; later, however, he admitted that he would only have told Hall: "Joan, I'm going to be over at the whiskey store [lot] here. . . . If anybody comes there looking for me, tell them that I am over here at the whiskey store [lot] where we are parking our trucks." (Hall did not testify that Baker told her to tell the applicants that they must come to the Hazard lot or the mine to be considered for employment; she further did not testify that she did so.) When asked if he ever had any intention of using the applications that Hall collected from the alleged discriminatees, Baker replied: "If I had needed them real bad, I would have called them."

Gilliam testified that he became employed by the Respondent during the week of August 1, but he did not dispute the testimony of the General Counsel's witnesses who testified that at the July 15 safety meeting Baker introduced him as the individual who would be "running" Respondent's operations at the Starfire Mine. When Gilliam and Daniels did the hiring, Gilliam would check to see if applicants had proper safety certificates; Daniels would place applicants with experienced drivers to see if they could handle a truck. Gilliam continued to participate in the hiring processes after Hoskins took over Daniels' responsibilities in September (for example, Gilliam testified about hiring Godsey in December).

Gilliam admitted that he knew of the Union's "Preferential Hiring List" from the time that he was hired by Baker. Gilliam testified, however, that the listing of alleged discriminatees made no difference in his hiring decisions. Gilliam testified that at some point he placed the applications that Hall had taken at the Hazard office with applications that were taken at the mine. (Gilliam did not place a date on this act, but Hall testified that she gave her applications to Gilliam "three or four weeks" after the alleged discriminatees appeared at the office on July 11 and 14; therefore, Gilliam took possession of the alleged discriminatees' applications sometime in early August, or immediately after he became employed by the Respondent.) Gilliam testified that, although he hired many applicants at the mine when they came there to apply, turnover was great, and at times there were needs for employees when no applicant was present. In such cases, Gilliam testified, he would review the applications and call three or four possibly suitable applicants and have them come to the mine. From interviews of those applicants, he chose the one (or ones) that he needed.

Gilliam testified that when he was interviewing applicants, he considered experience and willingness to work long hours. Gilliam was asked and he testified:

Q. What about the type of license, type of commercial driver's license?

A. That would apply too. I would rather have had, at times, someone Class-A due to I know he could handle the larger vehicles if we needed it, you know. I think Class-A, you know, is just a step above being Class-B, which it is.

When you're on Class-B, you know, you can just haul under the weight limits of Class-B. . . . Well, like I say, that would probably be one of my first preferences, really, if I was interviewing and so forth, I would rather have a Class-A driver.

(Gilliam then contradicted himself by volunteering: "But, if I wasn't needing a Class-A, you know, it wouldn't have no preference on me, I'd stick with a Class-B guy." On cross-examination, however, he reaffirmed that, if he had a choice, he "probably would" prefer an applicant with a class-A license.)

Gilliam has training in mine safety, and he was in charge of seeing that employees whom the Respondent did hire had received the required Annual Refresher certificates and Newly Employed Experienced Miner certificates before they worked at the Starfire Mine. Gilliam testified that there were about 40 employees at the July 15 safety-training class; on cross-examination, he admitted that such training is usually given after hiring decisions are made.

Hoskins testified that he began working for the Respondent in mid-August, but above I have found that it was not until after September 8 (when Ray Napier was hired) that Hoskins was hired. Hoskins worked as a mechanic for 2 weeks (or until mid-to late September) when Baker assigned him to assume Daniels' role in doing the hiring along with Gilliam. Hoskins testified that neither Baker nor Gilliam told him anything about the Union's "Preferential Hiring List," and Hoskins further testified that he did not know that any such thing existed until shortly before trial. When he began hiring employees, Hoskins was not given the applications that Hall had taken from the alleged discriminatees. Hoskins testified that he started taking applications from those who came to the jobsite, and he worked strictly from those until some point in October when the Respondent established an office facility at the Starfire Mine. At that point, Gilliam brought the applications that Hall had taken at the Hazard office (including those of the alleged discriminatees) and placed them with applications that Hoskins had taken, in no particular order.

Hoskins further testified that "many times" he and Gilliam would hire applicants "on the spot" when they appeared at the mine, but also "many times" they would resort to the applications that they had received and "bring" (probably call) the applicants in for an interview. Hoskins testified that he and Gilliam would interview applicants together, if Gilliam was available. Whether Gilliam was available for the interview or not, Hoskins testified that he "always" sent applicants to Gilliam for a review of their safety qualifications.

Hoskins testified that Godsey came to the job from two to four times seeking work before he hired him. Hoskins denied that, when he offered Godsey food in the parking lot of Chaney's restaurant, he told Godsey that he had been given a list of employees to hire or not hire. Hoskins further testified that, in fact, Baker never told him who to hire, or not hire.

On cross-examination, Hoskins testified that from his prior working experience at Leslie Haulers, and elsewhere, he personally knew alleged discriminatees Hayes, Brewer, Strong, Lovins, Cockrell, Ray Napier, Grover Napier, Ronk, Stacy, Bush, Godsey, Fugate, Combs, and Caudill. Hoskins agreed

that all of those men were good drivers, and Hoskins further agreed with the blanket proposition that he "would have hired any of them." When asked specifically about Napier, Hoskins vacillated about whether he ever saw Napier's application when he went through the stack. Then Hoskins was asked and he testified:

Q. About how many times would you guess that you went through those applications that you had on file?

A. Thirty five or forty.

Q. And when you went through them, did you go through the whole stack?

A. I went from front to back and got the most qualified driver.

Hoskins further acknowledged that, had he seen the applications of alleged discriminatees Cockrell, Noble, and Stacy (which Hall had taken on July 11 or 14), he would have considered them for employment as tandem drivers. After these admissions, Hoskins was asked on redirect examination:

Q. Did you ever go all the way through the stack of application forms?

A. Not completely.

Q. When would you stop?

A. I would go from the front of it until I found enough applicants to fill the spots that I needed.

On further cross-examination, Hoskins was confronted with his prior testimony that he reviewed all of the applications whenever he sought to hire a new driver. Although given ample opportunity to explain, Hoskins could do no more than repeat that he did not review all applications before calling applicants in.

Further on cross-examination, Hoskins testified that he would not have considered any applicant for a tractor-trailer position unless his application listed a great deal of experience as a tractor-trailer driver. Hoskins admitted that, in cases where an application was not specific about how much tractor-trailer driving the applicant had done in the past, he did not call the applicant to ask.

As previously noted, the General Counsel alleges that the Respondent delayed employment of, or denied employment to, 23 of the 25 former employees of Chaney Trucking and Leslie Haulers who were named on the Union's "Preferential Hiring List." The General Counsel does not allege that the Respondent discriminated against all employees of Chaney Trucking and Leslie Haulers. Nevertheless, the Respondent offered into evidence a collection of 30 applications (and personnel files) which the Respondent represented as being those of all former Chaney Trucking and Leslie Haulers employees whom the Respondent did hire as drivers.<sup>20</sup> One of the applications that the Respondent offered in this group was apparently included by mistake; this was the application of one Jesse Darler for whom there is no evidence that he ever worked for the Respondent. (The safety certificates that were included in Darler's file refer only to other employers; moreover, on the face of his

<sup>20</sup> When counsel was offering these applications, he stated that he was including a number 35. In fact, the Respondent submitted no Exh. 35.

application someone wrote: "Called 1-13-98. Wasn't interested.") Also erroneously included in the Respondent's offering was the application of alleged discriminatee Hayes who, it is undisputed, never worked for the Respondent. Relevant elements of the remaining 28 files that were offered by the Respondent as those of former employees of Chaney Trucking and Leslie Haulers whom it hired are:

(1) Charles Ball (who was hired about October 6, according to a note on his application) had a class-A license, but his application reflects no tractor-trailer experience.

(2) Hubert Begley (who was hired on July 22, according to the testimony of Baker) had a class-A license, but he had driven for Chaney Trucking for the last 2 years; apparently this was as a tandem driver because, again, Chaney had no tractor-trailers.

(3) Alleged discriminatee Combs (who was hired on March 9, 1998, as stipulated) possessed a class-A license, but on his application he wrote that he had driven only a tandem for Chaney Trucking for 4 years. Also, Hall wrote on his application: "Can drive a tractor-trailer, but has been a while. Prefers tandem."<sup>21</sup>

(4) Alleged discriminatee John Fugate (who was also hired on March 9, 1998, as stipulated) had a class-A license, but he listed no experience at driving a tractor-trailer. Hall wrote on Fugate's application, "Can drive tractor-trailer, tandem and rock truck." (A rock truck is not a tractor-trailer, according to Baker.)

(5) Robert Fugate (who was hired about December 18, according to an INS form that he signed) had no commercial driver's license. On his application Fugate listed his experience as that of a "Highwall" driver. (A Highwall Miner is an off-the-road vehicle that is used at points where coal is mined by boring into open coal seams, according to Baker.)

(6) Davis (who was hired on July 16, as stipulated) had only a class-B license, and he had experience only in driving tandems. Hall wrote on his application, "Can only drive tandem." (Again, Davis was listed on the Union's "Preferential Hiring List," but he is not an alleged discriminatee.)

(7) Durham (who was hired on August 8, as stipulated) had a class-A license, and he listed extensive tractor-trailer experience. (Again, Durham was listed on the Union's "Preferential Hiring List," but he is not an alleged discriminatee.)

(8) Alleged discriminatee Godsey (who was hired on December 15, as stipulated) stated on his application that he had a class-A license, but he had no experience in driving tractor-trailers.

(9-11) Carl Gray (who was hired on July 16, according to Baker) and Billy Holland and Andy Miller (whose hire dates cannot be determined) each possessed class-A licenses, but there is no indication in their files that they had any previous experience in driving tractor-trailers.

(12) Samuel Hollifield (who was hired about October 10, according to an INS certificate in his file) had a class-A license, and he had experience with several trucking firms, but his application reflects no experience in driving tractor-trailers.

(13) Kenneth Grigsby (who was hired on February 15, 1998, according to certificates in his file and a handwritten notation on his application) had no commercial driver's license; his application contains the notation that he was hired to drive a Highwall Miner.

(14) Ray Napier (who was hired on September 8, as stipulated) possessed only a class-B license.

(15) Billy Joe Noble (who received a Newly Employed Experienced Miner's certificate on July 16 as an employee of the Respondent) had only a class-B license.

(16) James Noble (who was also hired on July 16, according to Baker's testimony and a certificate in his file) possessed a class-A license, but his only experience was with Chaney Trucking, and therefore in tandem-driving only.

(17) Michael Pennington (who was hired in October according to testimony of Gilliam, but whose application is dated May 13, 1998, as mentioned above) had only a class-B license.

(18) Timothy Roberts (whose date of hire cannot be determined) had only a class-B license and his application indicates that he was only a "tandem" driver.

(19) Alleged discriminatee Ronk (who was hired on September 8, as stipulated), possessed only a class-B license.

(20) Mack (or Max) Sizemore (who was hired on July 16, according to Baker's testimony) did possess a class-A license, but Hall wrote on his application "very little experience on t/t [tractor-trailer]." Sizemore, moreover, listed only tandem experience on his application.

(21) Jeffrey Skiles (who was hired on July 16, according to Baker's testimony) did possess a class-A license, but he listed as his experience only "truck driver," and there is no indication that he had ever driven a tractor-trailer.

(22) Ira Southwood (who was hired in December, according to testimony by Gilliam) had a class-B license,<sup>22</sup> and his application lists only tandem experience.

(23) Joseph Southwood (whose date of hire cannot be determined) also had only a class-B license, and his application listed only tandem experience.

(24) Ola Stacy (whose date of hire cannot be determined) had no proof of possession of a commercial driver's license at the time that she applied, and there is no evidence that she subsequently obtained one.

(25) Carl Vanover (who was hired about July 31, according to a certificate in his file) possessed only a class-B license, and his previous 16 years of experience was with Chaney Trucking (which, again, only used tandems).

<sup>21</sup> Again, the General Counsel contends that alleged discriminatees who were hired by the Respondent were hired belatedly and that the delays in hiring violated Sec. 8(a)(3).

<sup>22</sup> Contrary to the effect of an exchange between counsel for the General Counsel and Hall at Tr. 316, a copy of Southwood's license is in evidence.

(26) Virgil Williams (who was hired on July 16, according to Baker's testimony) possessed a class-A license, but he had driven only tandems for the previous 5 years.

(27) Marcus Wooten (who was hired about August 7, according to a certificate in his file) had only a class-B license.

(28) Hunter Yeary (who was hired by the Respondent in October, according to Gilliam) had no proof of possession of a commercial driver's license.

In addition to these, during cross-examination of Gilliam the General Counsel examined the files of other employees who were hired by the Respondent (i.e., others who were not former employees of Chaney Trucking or Leslie Haulers). That examination disclosed that during October the Respondent hired Tim Deton who had only a class-B license, and it hired Donald Hollifield who had no commercial driver's license. In December, the Respondent hired Hubert Hylton as a driver although he had a only class-B license. Also in December, the Respondent hired Jerry Jones and Shawn Baker although neither had a commercial driver's license.

#### *D. Credibility Resolutions and Conclusions*

##### *The prima facie case*

In *Wright Line*,<sup>23</sup> the Board set forth the test to be employed in cases where the General Counsel alleges 8(a)(1) and (3) violations that turn on employer motivation. First, the General Counsel must make a prima facie showing sufficient to support an inference that known protected conduct was a motivating factor in the employer's action. If General Counsel does establish a prima facie case, the burden then shifts to the employer to demonstrate that it would have taken the same action notwithstanding the known protected conduct of the alleged discriminatees. Specifically in cases where unlawful refusals to hire employees are alleged, the required elements of the prima facie case are as follows: (1) an application by each alleged discriminatee; (2) refusals to hire each alleged discriminatee; (3) a showing that each alleged discriminatee was a union member or sympathizer; (4) a showing that the employer knew of or suspected such membership or sympathy; (5) availability of at least some jobs for the applicants; and (6) proof of a degree of animus against the known union membership or sympathy sufficient to support an inference that protected conduct was a motivating factor in the employer's action in refusing to hire each alleged discriminatee.<sup>24</sup> The initial inquiry in this case therefore is whether the General Counsel has presented a prima facie case that the Respondent refused, at least for some period of time, to hire the alleged discriminatees whose names appeared on the Union's "Preferential Hiring List."

(1) The parties stipulated that each of the 23 alleged discriminatees applied for work on either July 11 or 14. (2) The

parties further stipulated that none of the alleged discriminatees was hired by the Respondent until September 8 when the Respondent hired Ronk and Ray Napier. By that point, however, the Respondent had already hired at least 44 other truckdrivers (16 in July, and 28 in August). Thus, at least for a time, the Respondent refused to hire all of the alleged discriminatees. (3 and 4) Knowledge of the prounion sympathies of the alleged discriminatees is not an issue; as Baker admitted, Dixon, Napier, and Hayes told him on July 17 that the applicants who had been named on the Union's "Preferential Hiring List" had "worked with the Union." Hoskins denied having ever seen the Union's "Preferential Hiring List," but Gilliam admitted that he knew of it from the start of his employment at the first of August. I do not believe Hoskins' testimony that he never saw a copy of the Union's "Preferential Hiring List." Even if that testimony were true, however, Baker did the hiring initially, and Gilliam testified that he did the hiring with Daniels from the time that he was hired about August 1 until mid- to late September, and Hoskins testified that Gilliam "always" did the hiring along with him thereafter, at least as far as the safety reviews of the applicants were concerned. The necessary element of knowledge was therefore embodied in Gilliam who was a part of all hiring decisions, at least after August 1. Finally on this point, although Baker testified that he turned the hiring over to Daniels after the first week of operations, or about July 23, Baker did not testify that he somehow withheld the Union's "Preferential Hiring List" from Daniels, and there is no basis for finding that he did. Therefore, even if Hoskins' was truthful in his testimony that he never saw the Union's "Preferential Hiring List," others who did see it were involved in all of the hiring decisions of the Respondent. (5) The parties stipulated that the Respondent hired 141 employees from the beginning of its operations at the Starfire Mine on July 16 through May 1998. Discounting the 10 whom Baker testified that he hired on July 16, the day before he received the Union's "Preferential Hiring List,"<sup>25</sup> the General Counsel has still shown that there were at least 130 truckdriving jobs available from July 17 through the termination of the Respondent's operations at the Starfire Mine in late 1998. The remaining prima facie element, therefore, is animus.

For evidence of animus the General Counsel heavily relies on Godsey's testimony that Baker and Hoskins told him that Chaney Trucking and Cypress had given Baker a list of employees to hire, and not hire, and that Baker told him that Cypress would not have given him a contract if he had hired a "majority" of Chaney Trucking employees. Baker and Hoskins showed themselves not to be trustworthy witnesses on many other accounts, and their denials of this testimony are necessarily suspect. Nevertheless, as quoted above, without attempting to exhaust Godsey's recollection, the General Counsel led Godsey directly to "majority," the key word in this critical part of

<sup>23</sup> 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

<sup>24</sup> See *Hoboken Shipyards*, 275 NLRB 1507, 1514 (1985), citing *Big E's Foodland*, 242 NLRB 963, 968 (1979), and *Pan American Electric*, 326 NLRB No. 7 (1999) (not reported in Board volumes), citing *GM Electric*, 323 NLRB 126, 128 (1977).

<sup>25</sup> Baker was not a truthful witness, and the record only has his bare statements that he hired 10 employees on July 16; nevertheless, the General Counsel did not object to Baker's being led to the names of those witnesses (with a document that was not offered into evidence), and the General Counsel did not offer evidence of when those 10 employees were actually hired, if not July 16.

his testimony.<sup>26</sup> Godsey had not been making a favorable impression before he got to this point in his testimony, and the General Counsel's leading appeared to me to be a tacit admission that Godsey could not be credited without leading. Moreover, there is no logical sense to Godsey's testimony that Baker told him that Cypress "wouldn't have given him a contract" if he had hired a majority of Chaney Trucking employees; Cypress did give Baker the contract on July 10,<sup>27</sup> and it was after that point that Baker, many times, represented to the alleged discriminatees and the Union that he was going to hire the employees named on the Union's "Preferential Hiring List." Baker presumably would not have made those representations if Cypress had threatened not to give him the contract, and it is exceedingly unlikely that Baker would have told Godsey that Cypress did so. Finally, Godsey's admission that Baker also told him that he would hire "who he wanted to" is hardly consistent with the inference that the General Counsel seeks to draw from his testimony. Godsey's testimony of what Baker and Hoskins told him, therefore, is not probative evidence of animus.

The necessary element of animus is found, however, when one looks at the number of applicants on the Union's "Preferential Hiring List" who were hired, or not hired, and compares that number to the total number of applicants who were hired. The parties stipulated to the number of employees who were hired, by months. The Board has held that employers may lawfully prefer former employees, and Respondent also introduced a summary of how many former Leatherwood Mine employees it hired, also by months. These figures are displayed in the following table along with the numbers (and names) of the applicants whose names appeared on the Union's "Preferential Hiring List" who were hired.

<i>Month</i>	<i>Em- ploy- ees Hired</i>	<i>(Less) Former Leath- erwood</i>	<i>Differ- ence</i>	<i>On Union List Hired</i>
<b>1997</b>				
July	16	6	10	1 (Davis)
August	28	6	22	1 (Durham)
September	9	2	7	2 (R. Napier, Ronk)
October	16	3	13	0
November	6	2	4	0
December	14	0	14	1 (Godsey)
<b>1998</b>				
January	11	3	8	0
February	8	1	7	0
March	12	0	12	2 (Combs, Fugate)
April	9	0	9	0

<sup>26</sup> This was true, even though during the pretrial conference, I had warned both sides against leading witnesses to key words and phrases before exhausting their recollections.

<sup>27</sup> The contract is not in evidence, but the record has more than Baker's testimony on this point; Dixon admitted that he heard about the contract-signing on July 10 from another union representative.

May	12	2	10	0
<b>Totals</b>	141	25	116	7
<b>Totals</b>	125	19	106	6
(less)				
July 1997				

I enter the row that is designated "Totals (less) July 1997" because the numbers for that month may fairly be disregarded. This is because: (1) Baker testified (without rebuttal) that it was on July 16 that he hired 10 of the 16 employees who were hired that month; July 16, of course, was one day before Baker received the Union's "Preferential Hiring List"; (2) four of the six others were former Leatherwood employees; (3) the two other employees who were hired in July (Begley and the unidentified 16th employee) are too few in number to raise an inference of animus. Therefore, the number of employees hired in July is not, as the General Counsel contends, evidence of unlawful animus. Also, Davis was on the Union's "Preferential Hiring List," but Baker named Davis as one of the employees whom he hired on July 16, the day before he received the list. Therefore, the Respondent's hiring Davis is not, as the Respondent contends, evidence that it harbored no animus against the protected activities of the employees who were named on the Union's "Preferential Hiring List."

Disregarding July (and the hiring of Davis in July), the above table shows that, overall, the Respondent hired 125 employees, 19 of whom were former Leatherwood Mine employees, but 106 who were not; of the 106 non-Leatherwood employees (as I shall call them), only 6 of the 24 (again, excluding Davis) applicants who were named on the Union's "Preferential Hiring List" were ever hired. Looking at it another way, by subtracting the total of vacancies that were filled by those named on the Union's "Preferential Hiring List" from the total of vacancies that were filled by non-Leatherwood employees, there were exactly 100 vacancies that could have been, but were not, filled by other applicants who were on the Union's "Preferential Hiring List." The possibilities of the Respondent's lawfully filling 100 vacancies without hiring one employee on the Union's "Preferential Hiring List" are, at minimum, statistically remote.

Moreover, reviews of statistics for individual months for which records were produced further demonstrate the meager possibilities that lawful selection processes were employed. In August, the first full month after the Respondent received the Union's "Preferential Hiring List," the Respondent hired 28 employees; 6 of these were former Leatherwood employees, but 22 were not; of these 22 non-Leatherwood employees, only 1 employee whose name appeared on the Union's "Preferential Hiring List" (Durham) was hired. The Respondent has emphasized that it rejected 100 applicants in addition to the alleged discriminatees, but it has failed to show that any of the 100 other rejected applicants had applied in August, or before. In fact, Baker's secretary Hall testified that she could find no rejected applications that were filed at the beginning of operations, other than those of the alleged discriminatees. Therefore, the August figures, alone, are evidence of a discriminatory motive. Admittedly, in September two of the seven non-Leatherwood employees who were hired (Ronk and Ray Napier) had been named on the Union's "Preferential Hiring

List,” but in October the Respondent hired 13 non-Leatherwood employees, and it hired no employees who were on the Union’s “Preferential Hiring List.” In November the Respondent hired four non-Leatherwood employees, but it hired no employees who had been listed on the Union’s “Preferential Hiring List.” In December, the Respondent hired 14 non-Leatherwood employees, but it hired only one employee (Godsey) who was on the Union’s “Preferential Hiring List.” From January through May 1998, the Respondent hired 45 non-Leatherwood employees, but the names of only 2 of those hired (Combs and Fugate) had appeared on the Union’s “Preferential Hiring List.” These extreme ratios clearly demonstrate animus against the employees whose names had appeared on the Union’s “Preferential Hiring List.”<sup>28</sup>

Finally on this issue, the Respondent contends that the fact that it ultimately hired seven of the employees on the Union’s “Preferential Hiring List” defeats any contention that it had unlawful animus toward the protected activities of any applicants. Again, immediately to be disregarded is the hiring of (non-alleged-discriminatee) Davis which occurred on July 16, the day before the Respondent had even received the Union’s “Preferential Hiring List.” That is, the Respondent did not know that Davis was on the Union’s “Preferential Hiring List” when it hired him, and the Respondent’s hiring of Davis proves nothing. Admittedly, nonalleged discriminatee, and listed promotion employee, Durham was hired within 3 weeks of the Respondent’s receiving the Union’s “Preferential Hiring List,” but alleged discriminatees Ray Napier and Ronk were not hired until September 8. The Respondent therefore delayed the hiring of Ray Napier and Ronk at least through the full month of August during which it hired 28 others (22 of whom were non-Leatherwood employees). From July 17 until December 15, the Respondent delayed the hiring of Godsey, but during the August-November period alone, the Respondent hired 59 other employees instead of Godsey, 46 of whom were non-Leatherwood employees. From July 17 until March 9, 1998, the Respondent delayed the hiring of Fugate and Combs, but during the period from August 1997 through February 1998, the Respondent hired 92 employees other than Combs and Fugate, 75 of whom were non-Leatherwood employees. From all of this I conclude that the Respondent’s hiring of seven of those who were named on the Union’s “Preferential Hiring List” is not evidence of lack of animus. Rather, the Respondent’s delays in hiring five of those who are named on the Union’s “Preferential Hiring List” (while, at the same time, hiring so many other applicants who were not former employees of the Respondent) constitute further evidence of animus.

I therefore conclude that the General Counsel has presented a prima facie case of unlawful discrimination against the alleged discriminatees, and the Respondent’s defenses must be examined.

#### The defenses

The Respondent contends that it did not offer employment to the alleged discriminatees, or it delayed offering them employment, because: (1) they were not persistent in seeking employment; (2) they were not qualified tractor-trailer drivers; and (3) the applications of those who were qualified to drive tandems were passed over during honest processes of random selection.

*First defense—The Respondent’s “persistence” policy.* In *Irwin Industries*, 325 NLRB 796 (1998), the Board held that there was no violation where an employer showed that: (a) it had “historically” given preference to applicants who were persistent; and (b) the applicants whom it did hire showed persistence in pressing their applications by repeatedly asking for employment; but (c) the alleged discriminatees in that case showed no such persistence. Relying on *Irwin Industries*, the Respondent first contends that the alleged discriminatees in this case were delayed or denied employment because they failed to press their applications by coming, sua sponte, to the liquor store lot in Hazard where Baker stored trucks, or to the Starfire Mine itself, and asking for a second interview (after they had already interviewed with Hall).

Aside from the fact that the alleged discriminatees continued to press their applications through the Union,<sup>29</sup> this contention is immediately defeated by certain undenied testimony by alleged discriminatee Brewer. Brewer testified that, at one point after he submitted his application, he met Baker at the liquor store lot. Brewer testified that he asked Baker for employment; Baker wrote his name on a piece of paper, but Brewer heard nothing further from the Respondent until he received the stipulated offer of September 1998. On brief, the Respondent offers no suggestion of why Brewer’s approach to Baker at the liquor store lot was not a sufficient pressing of his application to warrant his employment. The failure of the employees who were listed on the Union’s “Preferential Hiring List” to submit, sua sponte, to a second interview, therefore, appears to have made no real difference to the Respondent. Even discounting Brewer’s testimony, however, there is ample evidence that the Respondent’s “persistence” policy was nothing more than an educated afterthought.

Baker testified that he had been hiring employees for about 50 years, but he did not testify that he had ever before required employees to return time and again to press their applications if they were not hired upon their first application. Moreover, it is quite apparent that Baker did not actually adopt such a policy for his hiring at the Starfire Mine; if he had done so, he would have told Daniels, Gilliam and Hoskins about the policy, and he would have testified that he had done so. Baker did not so testify. Additionally, Gilliam did not mention persistence as a factor in hiring qualifications, and Hoskins testified (when led) only that persistence was “significant”; Hoskins did not testify that he considered lack of persistence to be a disqualification.

<sup>28</sup> Citing *San Angelo Packing Co.*, 163 NLRB 842, 846 (1967), and *Continental Radiator Corp.*, 283 NLRB 234, 248 (1987), the Board in *Fluor Daniel, Inc.*, 304 NLRB 970 (1991), found that such a “blatant disparity” in the selection of applicants supported a finding of a prima facie case of discrimination.

<sup>29</sup> Again, on July 17, August 20 and 29, the Union met with Baker to request the hiring of the alleged discriminatees. By subsequent correspondence Dixon did the same. On September 23, Gilliam replied to that correspondence by stating that the Respondent had already begun hiring the applicants who were named on the Union’s “Preferential Hiring List.”

Further, Gilliam and Hoskins testified that they did call several applicants who had filed applications and left, but they did not testify that they called only those who had returned to the job site to ask for work thereafter. All of which is to say that the Respondent's "persistence" policy never existed, except as an afterthought constructed for the purpose of defense in this case.

Assuming, however, that the Respondent's "persistence" policy did exist at some point before trial, the Respondent is ill-positioned to assert that policy here because: (a) Baker did not tell the alleged discriminatees that they needed to be interviewed at the jobsite, or at the liquor store lot, as well as at the Hazard office, and (b) Baker gave the alleged discriminatees every reason to believe that further application efforts were not necessary.

*a. Baker did not tell the alleged discriminatees that they needed to be interviewed at the jobsite, or at the liquor store lot, as well as at the Hazard office*

Baker did testify that at one point while Hall was interviewing applicants he told the alleged discriminatees that they also needed to return for a second interview with him at the Starfire Mine, or the liquor store lot, but this testimony was false. When Baker was first asked, in non-leading fashion, what he told the alleged discriminatees, he testified only: "I told them that we would be needing a bunch of drivers, it looked like. Several of them told me that they had several years [of driving experience] in this and that. I told them that we would most certainly be able to use them, I felt like." Baker did not then testify that he qualified his statements to the alleged discriminatees by also telling them that they additionally needed to make a trip to the mine and be interviewed again. The need for such testimony was sensed by the lawyer, however, and he asked Baker the leading question: "Did you ever tell them or tell anyone that one of the conditions of getting hired was to show up to work or show up on the job?" At first, Baker ignored the lead and responded: "Anybody that knows me, that has ever worked for me, has showed up on the job and talked to me and been there ready to work, if they wanted to work for me." For that, the Respondent's counsel felt constrained to admonish Baker and to firmly repeat the lead: "That is not my question, Mr. Baker. My question was, did you ever tell anybody, these people who put in applications or Mr. Dixon or anyone, that if they wanted to get hired, they had to show up on the job?" Then, finally seeing the light, Baker gave forth with the above-quoted seven-sentence exposition of how, in every way imaginable, he had told the alleged discriminatees to keep in touch with him. If any part of that detailed recital had been true, Baker would have mentioned it the first time he was asked, "What did you tell them?" Also, if Baker's extensive answer had been even partially true, he would have responded with at least some of it when counsel first attempted to lead him. Instead, counsel had to admonish Baker that he was not answering his leading question, and he led Baker again. Finally, Baker grasped the significance of the leading questions and gave his seven-sentence answer, which answer was palpably false.

Also, Baker was asked on cross-examination if he told Hall to tell the applicants that they needed to come to the mine (or the liquor store lot) for a second interview. Baker was first

evasive; then he said that he did; then he admitted that he only told Hall to tell applicants where they could find him if they asked. At minimum, Baker's vacillation would not have occurred if there had been any truth to his testimony that he had previously had a policy of requiring persistence by applicants and that he categorically told the alleged discriminatees about that policy.

Finally on this point, Baker was not a truthful witness, but even if his testimony is credited it was no more than that he only told *some* of the applicants who came to the Hazard office that they also needed to come to the Starfire Mine and undergo a second interview. Certainly, Baker did not identify any of the alleged discriminatees as being present when he allegedly announced his "persistence" policy. Moreover, the alleged discriminatees appeared at the Hazard office on two dates, July 11 and 14, but Baker did not testify that it was more than once that he announced his policy. Also, it is undisputed that applicants other than the alleged discriminatees came to the Hazard office, and Baker could well have been speaking only to them.

*b. Baker gave the alleged discriminatees every reason to believe that further application efforts were not necessary*

As quoted above, Baker on cross-examination admitted that he told the alleged discriminatees that he would be hiring them as he needed them. Baker's making this statement was hardly surprising; Baker knew that most of the alleged discriminatees had worked for Chaney Trucking at the Starfire Mine, and he obviously wanted to take advantage of their experience there. Additionally, according to the above-quoted testimony of the General Counsel's witnesses, which testimony I credit, on July 11 (or July 14, or both) Baker represented to the alleged discriminatees that the only condition to his offer to employ them was that they must secure their class-A licenses. The alleged discriminatees relied on Baker's representation to their detriment (the time and expense involved) and did secure their class-A licenses (the only exceptions being Ronk and Ray Napier who did ultimately get hired and Mullins who did not). In a fundamental sense, therefore, Baker assured the alleged discriminatees that he was contractually obligated to hire them without their doing anything more—such as come to the Starfire Mine and submit to another interview, at least without being called to do so.

Also, on July 15, Baker (through Hall) convened all applicants for the safety-training class. That class, as Gilliam admitted, was to secure for the former Chaney drivers Newly Employed Experienced Miner certificates. The nature of such training, of course, would have caused the alleged discriminatees to believe there was no other predicate for their being hired, except securing their class-A licenses and waiting by the telephone. Moreover, at the July 15 session, Gilliam told all applicants that they would be put to work in groups of five, as Baker got his trucks in service. Baker, himself, told the applicants that they would be driving safe trucks, and if they found a truck to be unsafe, they "were not to leave the parking lot." These statements and actions would have affirmatively created in the minds of the alleged discriminatees the impression that they need do nothing else to secure employment, except secure

their class-A licenses, before being called to report to work or, at least, before being called for further interviews.

Also on this point, Baker was not lawfully required to deal with the Union, but he did. In fact, Baker first contacted Dixon to tell him that he was one of the bidders for the Starfire Mine contract and that he wanted to work things out with the Union. On July 17, Baker told Dixon, Napier and Hayes that he had no intention of fighting the Union (as Chaney had done), that he had intentions of hiring all of the former Chaney drivers, that all they needed to do was secure their class-A licenses, and that the alleged discriminatees could use the Respondent's trucks at the Leatherwood Mine to practice for the examination. On August 20, Gilliam told Dixon, Napier and Hayes that he was going to start hiring those on the Union's "Preferential Hiring List" as soon as he got "familiar" with the job. On August 29, Baker told Dixon that he could thereafter hire at least three employees out of five from the Union's "Preferential Hiring List," and that Napier should come back to the Hazard office for an interview.<sup>30</sup> Dixon thereafter tried to contact the Respondent, but his calls and letters went unanswered, except for a letter of September 26 in which Gilliam stated that: "We have already started hiring employees on the preferential hiring list as of this date." Therefore, the Respondent affirmatively gave the Union, as well as the alleged discriminatees, the impression that no further interviews were necessary.<sup>31</sup>

In summary, the Respondent's first defense is to be rejected because it has not shown that its "persistence" policy existed at any time before the trial in this case; even if the policy did previously exist, the Respondent has, by word and by deed, assured the employees and the Union that it would not be applied in this case. Respondent's invocation of *Irwin Industries*, therefore, is nothing short of a cynical attempt to escape the lawful consequences of its actions.

*Second defense—The alleged discriminatees' qualifications.* I have found above that all 23 of the alleged discriminatees except Mullins, Ronk, and Ray Napier possessed class-A licenses when they applied for work on July 11 or 14, or they secured class-A licenses immediately after they applied, and they did so at Baker's instructions. The Respondent contends, however, that, even though the alleged discriminatees had secured their class-A licenses, they were not experienced in driving tractor-trailers.

Not all of the personnel files of all of the drivers that the Respondent hired were placed in evidence, but the Respondent did place in evidence the files of 28 of the drivers whom it did hire. All 28 had most recently worked for Chaney Trucking or Leslie Haulers, both of which used only tandems. As listed above, only Durham stated on his application that he had tractor-trailer

experience. The remaining 27 applications clearly show that the applicants who filed them had no tractor-trailer experience, even if some of them did possess class-A licenses. Indeed, four of the former Chaney drivers who were hired by the Respondent instead of the alleged discriminatees had no commercial driver's licenses: Robert Fugate, Grigsby, Ola Stacy, and Yeary.<sup>32</sup> Moreover, as also shown above, of five additional non-Chaney drivers whom the Respondent hired instead of the alleged discriminatees two (Deton and Hylton) had only class-B licenses and three (Hollifield, Jones and Baker) had no commercial driver's licenses at all. Necessarily, none of those five had any tractor-trailer experience.

Additionally, as Gilliam and Hoskins admitted, the Respondent would have preferred to have hired drivers who had their class-A licenses over drivers who had only class-B licenses; any employer in the industry logically would. The Respondent, however, hired at least 17 class-B-licensed drivers, or non-licensed drivers,<sup>33</sup> rather than the 13 alleged discriminatees who held class-A licenses when they applied<sup>34</sup> or the 7 alleged discriminatees who secured their class-A licenses at Baker's behests and promises of future employment.<sup>35</sup>

Tractor-trailer experience was not given by Baker as a reason for hiring any of the 10 employees that he personally hired on July 16 or the 1 employee he personally hired on July 22 (Begley). Indeed, the reason that Baker gave for hiring 5 of those 11 employees included nothing about truckdriving experience of any kind. According to Baker's testimony: (1) Baker hired Irwin Combs, because Combs' mother worked at a dry cleaners that Baker owns and, "she wanted me to hire her son and I hired her son." (2-3) Freddie Campbell and Max Sizemore, "might have" been recommended for hire by former employee James Noble, but Baker did not testify upon what basis those recommendations might have been made; certainly, Baker did not testify that it was based on tractor-trailer experience. (In fact, on the application of Sizemore that the Respondent introduced into evidence, Hall wrote "very little experience on t/t [tractor-trailer].") (4) Baker hired Jeffrey Skiles, because Skiles was "kind of a personal friend of mine." (On Skiles' application, Hall entered no notation of tractor-trailer experience, something that Hall testified that she was careful to do). (5) Baker hired Begley only because, according to Baker, he was "born and raised just across the hill from where I was and I knowed him." That is, Baker personally hired these five employees for reasons unrelated to trucking experience of any kind. Baker's doing so further erodes the Respondent's defense that the alleged discriminatees were not hired (or, in some cases, were not hired sooner) because they had no tractor-trailer experience.

<sup>30</sup> Baker testified that on August 29 Dixon said that if the Respondent would hire Napier and Hayes, "to hell with the rest of them." If there had been any truth to this testimony, it would have been corroborated by Gilliam who was also present.

<sup>31</sup> The Respondent contends that Hall was only an office clerical who had no authority to hire employees, even though she interviewed them. The alleged discriminatees, however, did not know that; moreover, she had called alleged discriminatees to come to the safety-training class, and they had every reason to believe that she also would have called again if further interviews were necessary.

<sup>32</sup> Grigsby's file reflects that he was hired to drive a Highwall Miner, but the others were apparently hired as truckdrivers.

<sup>33</sup> These were the five non-Chaney drivers just mentioned plus former Chaney drivers Robert Fugate, Davis, Grigsby, Billy Joe Noble, Pennington, Roberts, Ira Southwood, Joseph Southwood, Ola Stacy, Vanover, Wooton, and Yeary.

<sup>34</sup> These were: Bush, Cockrell, Combs, Fugate, Gayheart, Godsey, Guerra, Haddix, Hayes, Hurley, Noble, Stacy, and Strong.

<sup>35</sup> These were: Brewer, Campbell, Caudill, Lovins, Grover Napier, Robinson, and Williams.

Another reason that the defense of lack of tractor-trailer experience fails is that it is an obvious afterthought. On July 17, at the same meeting that he received the Union's "Preferential Hiring List," Baker told the Union that he understood that many of the alleged discriminatees did not have class-A licenses, and those that did had no recent experience in driving tractor-trailers because they had been working for Chaney Trucking or Leslie Haulers. Nevertheless, Baker told the Union that they could be hired if they would come some Sunday and practice with new tractor-trailers that would be at the Leatherwood Mine. Baker did not make this offer just to be nice, and he did not make this offer to help the alleged discriminatees secure employment, and experience, as tractor-trailer drivers elsewhere. Baker made this offer because he knew that the experienced former-Chaney (and former-Leslie) drivers could be easily trained to work as tractor-trailer drivers. Indeed, Baker admitted at the hearing that all of the applicants could learn to drive a tractor-trailer satisfactorily, and, within a week

they would have been prepared to drive the tractor and trailers. I think that they would have been better than some that I have had to hire that have drove tractor and trailers for me down here that I have had problems with getting out to work and so on, these younger guys, that I didn't want to hire that did have experience. I'd rather have the older guys.

All of which is to say that Baker himself admitted to the qualifications of the alleged discriminatees, immediately as tandem drivers and, with minimal training, tractor-trailer drivers. Finally on this point, the Respondent makes no contention that the September 1998 offers were made only to limit its liability. Therefore, even though they were belated, the offers further belie the Respondent's contentions that the alleged discriminatees were not qualified applicants.

Therefore, the Respondent's defense that the alleged discriminatees were not hired because they were not experienced in driving tractor-trailers necessarily fails.

(As a corollary of its argument that the alleged discriminatees were unqualified to work for it, the Respondent on brief contends that none of the alleged discriminatees who did secure their class-A licenses (after Baker told them to) updated their applications to reflect their achievement. This is another obvious lawyer's afterthought. Neither Baker, Gilliam, nor Hoskins testified that it would have made any difference if the alleged discriminatees had updated their applications. Moreover, it is undisputed that at the August 20 meeting, Napier told Baker that all of the alleged discriminatees (except one) had secured their class-A licenses; at that time Baker did not tell Dixon, Napier or Hayes that the alleged discriminatees also needed to come back to the Hazard office (or go to the Starfire Mine) and update their applications. Also, as detailed above, the Respondent hired many employees who had only class-B licenses including Davis, Ray Napier, Billy Joe Noble, Pennington, Roberts, Ronk, Ira Southwood, Joe Southwood, Vanover, Wooten, Deton, and Hylton. Of course, truckdrivers who never received their class-A licenses could not have updated their personnel files to show that they had. Finally on this point, Hollifield, Jones, Robert Fugate, Grigsby, Ola Stacy, and Yearly had no

commercial driver's license when they applied for work with the Respondent; if any of them ever received one, the files that the Respondent placed in evidence show that they did not bother to update their applications.)

*Third defense—The Respondent's selection processes.* The Respondent's third defense is that the alleged discriminatees failed to secure employment with it, or failed to secure employment earlier than some of them did, because of an honest process of random selections. As the table above shows, from August 1 through May 31, 1998, the Respondent hired 106 non-Leatherwood employees, but not 1 of the employees named on the Union's "Preferential Hiring List" was called for an interview at the Starfire Mine. Had the Respondent called any of the applicants on the list, witnesses would assuredly have so testified. (Daniels did not comply with his subpoena, but the Respondent made no attempt to call any employee named on the Union's "Preferential Hiring List" who might have been called by Daniels.) Stated another way, although all of the alleged discriminatees had submitted an application by July 14, on every subsequent review of the stack of applications (however they were arranged), not one of them was selected to be called in for an interview. The Respondent proved that it rejected about 100 other applications, but it did not have 100 other applications before the alleged discriminatees applied. Of course, as time went by and more applications were received, the mathematical chances of any one applicant's being called diminished, but it is too much to believe that the applications of all 23 of the alleged discriminatees were subsequently passed over by simple chance, and I do not believe it.

Gilliam testified that he would review just a few applications before he would call any applicants to come in for interviews. This testimony made no sense, and it was incredible, because such an approach would not have permitted the finding of the best applicants available at any given time. Hoskins at first testified that he examined all applications, "from front to back and got the most qualified driver." When he was shown the applications of obviously qualified alleged discriminatees whom he personally knew, however, Hoskins retreated to Gilliam's approach and stated that he actually looked only at a few applications before he called applicants to come for an interview. Hoskins could not explain his inconsistency, but I can. Hoskins, like Gilliam, was not testifying truthfully.

I firmly believe that there was no randomness to the Respondent's selections after August 1, at least as far as the alleged discriminatees were concerned. Hoskins testified that from his prior working experience at Leslie Haulers, and elsewhere, he personally knew alleged discriminatees Hayes, Brewer, Strong, Lovins, Cockrell, Ray Napier, Grover Napier, Ronk, Stacy, Bush, Godsey, Fugate, Combs, and Caudill. Hoskins agreed that all of those men were good drivers, and Hoskins further agreed with the blanket proposition that he "would have hired any of them." It is too much to believe, and I do not believe, that only random chance prevented Hoskins from calling any of these drivers whom he knew and would have hired.

That is, I do not believe the testimony of Gilliam and Hoskins that the applications of the alleged discriminatees were blindly placed with all other applications. It is quite apparent, and I find, that the applications of the alleged discriminatees

were somehow isolated from those of other applicants, and the alleged discriminatees had no chance of being called in for an interview when the Respondent needed a truckdriver. (This was true, even though Baker testified that he would have called the alleged discriminatees, “[i]f I had needed them real bad.”) Therefore, I reject the Respondent’s defense that the alleged discriminatees were passed over by an honest selection process.

*Summary and conclusions:* Baker gave the Union and the alleged discriminatees assurances that they would be hired if they secured their class-A licenses; they did so.<sup>36</sup> Baker ordered them to attend a safety-training class for new employees; they did so. The Respondent principally defends this action by claiming that Baker had another hoop for the alleged discriminatees to jump through; to wit: without being called, appear at the Starfire Mine (or the liquor store lot) and ask for a second interview. Of course, 5 of the alleged discriminatees did appear and ask for a second interview, but their accidentally finding their way through Baker’s third hoop does not defeat the rights of the 18 other alleged discriminatees to have been hired, and it does not defeat the rights of those 5 to have been employed by the Respondent sooner than they were.

The Respondent took measures to ensure that the employees on the Union’s “Preferential Hiring List” were delayed in being hired, or not hired at all. This was done by burying, burning, or simply ignoring the list, rather than calling the listed employees for employment, although it regularly called applicants who were not on the list. (This was shown by Hoskins’ testimony that “many times” he and Gilliam called employees, and that “thirty-five or forty” times he looked through the applications for the telephone numbers of applicants when more employees were needed.) At the same time, Baker and Gilliam temporized by promising (even in writing) to employ the alleged discriminatees and even by trying to get the Union to send the alleged discriminatees to West Virginia to work there. These maneuvers were designed to delay, or to entirely thwart, the attempts to secure employment by the prounion employees who were named on the Union’s “Preferential Hiring List.” The delays and denials continued until September 1998 when, at the twilight of its contract with Cypress, it finally offered employment to all of the alleged discriminatees.

The Respondent has therefore failed to rebut the General Counsel’s *prima facie* case, and, under *Wright Line*, a violation must be found. Accordingly, I find and conclude that the Respondent violated Section 8(a)(3) of the Act by delaying the employment of, or denying employment to, the 23 alleged discriminatees.

#### THE REMEDY

As previously noted, the parties stipulated that in September 1998 the Respondent offered employment to all of the discriminatees who had not been employed before that month. The General Counsel accordingly seeks no hiring remedies after that month, but the General Counsel does seek backpay reme-

dies through that month (except, of course, for the five discriminatees who were hired before September 1998). The Respondent, however, contends that backpay remedies of nine of the discriminatees should be tolled before September 1998 because it earlier offered them employment, which offers they refused.

*Baker’s offer of employment to Napier.* On brief, the Respondent first contends that Baker offered Napier employment on August 20. I have not detailed Baker’s testimony in that regard because, on cross-examination, Gilliam admitted that Baker’s “offer” was not serious. Moreover, although Baker told Dixon during the August 29 meeting to have Napier contact him about the possibility of a job, and although Dixon did convey that message to Napier, and although Napier attempted to do so in person on September 2 and 4 by visiting the Respondent’s Hazard office, and although Napier further attempted to call Baker thereafter by telephone, Baker refused to return his telephone calls or otherwise acknowledge his visits. (This was true even though Hall, who was clearly Baker’s agent for the purpose, promised Napier that Baker would be contacting him.) That is, I credit the undenied testimony of Dixon and Napier in this regard, and I find that Baker did not offer employment to Napier on or after August 20.

*Hoskins’ offers of employment to nine of the discriminatees, including Napier.* Hoskins testified that he personally offered employment to nine of the alleged discriminatees, including Napier, and the Respondent contends that its backpay liability to each discriminatee is accordingly reduced. These nine are:

(1) *Brewer.* Hoskins testified that in October 1998, he made an offer of employment to Brewer by sending a message to him through Brewer’s brother (who then worked for the Respondent, but whose first name Hoskins could not remember at trial). Brewer credibly denied that he received any such message, but, more importantly, Hoskins attempted to send his message to Brewer one month after the stipulated offer of September 1998. (Also the message was to come and file another application; it was not an offer of employment.)

(2) *Bush.* Hoskins testified that at some point in 1998 that he could not specify, at a place that he did not specify, he met Bush and: “I offered him work to come to work for us. And he was employed by B & C Trucking and he said that he would rather stay with B & C Trucking at the time.” Bush generally denied that any representative of the Respondent offered him employment before the stipulated offer of September 1998, but the General Counsel did not call him to rebut Hoskins’ testimony. Hoskins was credible in his testimony that he made an offer of employment to Bush, but he was completely unable to place a date on the event. I shall not reward the wrongdoer by assuming that it was before the stipulated offer of September 1998.

(3) *Campbell.* Hoskins testified that at some point in time that he could not specify he met Campbell at a local convenience store. Hoskins told Campbell “to come by and I would give him a job because I had some tandems that were open . . . and he told me he’d rather not.” Campbell testified that the event that Hoskins described did not happen; moreover, Campbell testified that he had not seen Hoskins from the time that he was laid off by Leslie Haulers in 1997 until the day that he

<sup>36</sup> The only exceptions were Ray Napier and Ronk (whom the Respondent hired anyway, although belatedly) and Mullins. That Mullins did not secure a class-A license is not a defense to his case; the Respondent was shown to have hired too many others with only class-B licenses, or no licenses at all.

testified. Hoskins was credible in his testimony that he offered employment to Campbell, but Hoskins could place no date on the event and, again, I shall not reward the wrongdoer by assuming that it was before the stipulated offer of September 1998.

(4) *Caudill*. Hoskins testified that in January 1998, Caudill came to the jobsite twice. According to Hoskins: "The first time, I didn't have anything available. So, I got an application off of him. He came back the second time and I had an R-Model tractor opening. I tried to get Charles to drive it and Charles said that he didn't want to drive junk. He said that he wanted a new truck. He refused me. He didn't want the job driving an older truck." Thereafter, Caudill did not come back. Caudill testified that he went to see Hoskins "five, six times," seeking work, but each time Hoskins told him to come back some other time. Caudill flatly denied that Hoskins ever offered him a job driving an R-model truck. Hoskins was credible in his testimony that he offered a job to Caudill at some point in January 1998, but Caudill refused. Caudill's backpay rights, therefore, ended as of January 31, 1998.

(5) *Cockrell*. Hoskins testified that during September Cockrell came to the jobsite and asked for a job; Hoskins offered Cockrell a job and gave him an application "and he said he'd take it home and fill it out and give it back to me, and that's the last I had seen of him." Cockrell testified that in late November or early December he went to "the shop" where he met Hoskins. According to Cockrell, Hoskins seemed interested in hiring him until Hoskins realized that he had previously filed an application which had not been acted upon. Cockrell flatly denied that he took another application form with him when he left the shop, and he denied that Hoskins ever offered him a job. Hoskins was credible in his testimony that he gave an application to Cockrell, and that Cockrell left with the application, but Hoskins was not credible in his testimony that he also offered Cockrell a job; if Hoskins had actually offered Cockrell a job, he more than likely would have asked Cockrell to signify his acceptance by at least staying around long enough to complete the application.

(6) *Lovins*. On direct examination Hoskins testified that during the first 3 months that he worked for the Respondent (or before November 1997) he met Lovins at the garage that is operated by Hoskins' uncle. There, he offered Lovins a job but Lovins "said he would rather pass" because he was then driving a schoolbus and he liked that work. On cross-examination, however, Hoskins testified that his offer to Lovins was in 1998, but he had no idea when. Lovins denied receiving an offer of employment from Hoskins. Hoskins was credible in his testimony that he offered employment to Lovins, but cross-examination of Hoskins showed that he had no idea of when he made that offer. Again, I shall not reward the wrongdoer by assuming that it was before the stipulated offer of September 1998.

(7) *Napier*. John Napier is a brother of Grover Napier and Ray Napier. John worked for the Respondent in November (although his date of hire is not revealed in the record). Hoskins testified that in November, he "sent word" by John to Grover "to come to work." John returned to Hoskins with word that Grover "would like to work for us but he didn't want to come

and work because he'd had trouble with some people that worked with us." Napier, as discussed above, credibly testified that after August 29 he separately approached the Respondent to seek employment, but Hall repeatedly told him that Baker was unavailable. Napier further testified in rebuttal that his brother John did not convey to him that Hoskins might hire him if he came to the Starfire Mine. Napier was credible in this testimony, as well.

(8) *Stacy*. Hoskins testified that in mid-January 1998 he met Stacy at a local store and: "I asked him would he like to come to work close to home because he was working for Sam Kilgore at the time and he told me he'd rather not, said he'd rather stay where he was at because he liked it down there." (Apparently, the Kilgore place of employment is further from Hazard than the Starfire Mine.) Stacy admitted in rebuttal that he saw Hoskins at a convenience store, but he flatly denied that Hoskins ever offered him a job, and he further denied that he ever told Hoskins that he would "rather not" work for the Respondent. On cross-examination, Stacy acknowledged that he was working for Sam Kilgore at the time that he saw Hoskins at a convenience store, and he further acknowledged that he was still working for Kilgore. Hoskins was credible in his testimony that he offered employment to Stacy in mid-January 1998 and that Stacy refused by stating that he would prefer to continuing working for Kilgore. Stacy's backpay rights therefore ended on January 15, 1998.

(9) *Strong*. Hoskins testified that at some unspecified point in the latter part of 1998 he offered Strong a job, and Strong accepted and was to start the next day, but Strong did not thereafter show up for work. Strong admitted in rebuttal that he once talked to Hoskins, but he denied that Hoskins offered him a job. (Strong testified that he thought Hoskins was a mechanic for the Respondent at the time of their conversation and he asked Hoskins about the possibilities of part-time employment with the Respondent as a mechanic, but Hoskins replied that there were none.) Hoskins was credible in his testimony that in the latter part of 1998 he offered employment to Strong, but that Strong refused his offer. Nevertheless, and again, I shall not reward the wrongdoer by assuming that this happened before the stipulated offer of September 1998.

In summary, the Respondent hired Ray Napier and Ronk on September 8, 1997; it hired alleged discriminatee Godsey on December 15, 1997, it hired Combs and Fugate on March 9, 1998; it offered Caudill employment on January 31, 1998, but Caudill refused that offer; and it offered employment to Stacy on January 15, 1998, but Stacy refused that offer. The Respondent's backpay obligation to those discriminatees ended on those dates. The Respondent's backpay obligation to the other discriminatees ended on September 30, 1998. (The parties did not stipulate when it was in September 1998 that the Respondent made its offers of employment; I do not toll the backpay period until the end of the month because I shall not resolve the ambiguity in favor of the wrongdoer.)

Having found that the Respondent unlawfully discriminated against the 23 named job applicants, I will order it to make them whole for any loss of earnings and other benefits they may have suffered as a result of the Respondent's unlawful

discrimination against them, from July 26, 1997,<sup>37</sup> until the date that the Respondent hired them or made them a valid offer of employment, as determined above. Such amounts shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and shall be reduced by net interim earnings, with interest computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Because the Starfire Mine project has been completed, I shall order that the Notice to Employees be mailed to all of the Respondent's employees who were employed at the project from July 26, 1997,<sup>38</sup> until the completion of that project.

On these findings of fact, conclusions of law, and the entire record, I issue the following recommended<sup>39</sup>

#### ORDER

The Respondent, Glenn's Trucking Co., Inc., Hazard, Kentucky, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Denying employment to employee-applicants, or delaying offers of employment to employee-applicants, because they have become or remained members of United Mine Workers of America or because they have given assistance or support to that labor organization.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action deemed necessary to effectuate the purposes and policies of the Act.

(a) Within 14 days from the date of this Order, make the following named individuals whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, with interest, in the manner set forth in the remedy section of this decision.

Reid Brewer	Douglas Bush Jr.
Kermit Campbell	Charles Caudill
Clyde Cockrell	Mike Combs
John M. Fugate	Roy Gayheart

Spencer Godsey	Harold Guerra
James H. Haddix	Mike Hayes
Tom Hurley	Danny Lovins
Destry Mullins	Grover Napier
Ray Napier	Jerry Noble
Raymond Robinson	Leander Ronk
James Larry Stacy	Donny Strong
Kenneth Williams	

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusals to hire the above-named individuals, or to the unlawful delays in hiring those individuals, and within 3 days thereafter notify each of them in writing that this has been done and that Respondent's refusals to hire them, or delays in hiring them, will not be used against them in any way.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, Social Security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, mail a copy of the attached notice marked "Appendix"<sup>40</sup> to each employee who was employed by the Respondent at its Starfire Mine project at any time from July 26, 1997. The notice shall be mailed to the last known address of each of the employees after being signed by the Respondent's authorized representative.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification by a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

<sup>40</sup> If this Order is enforced by a judgment of the United States Court of Appeals, the words in the notice reading "Mailed by Order of the National Labor Relations Board" shall read "Mailed Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

<sup>37</sup> This is the 10(b) limitations date of the charge filed herein.

<sup>38</sup> *Id.*

<sup>39</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.